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ABSTRACT

In the last two decades, the federal government's role in state and local affairs has shifted markedly from subsidy to regulation. This report examines the origins and effects of the new "regulatory federalism" and proposes reforms. Chapter 1 delineates the subject, chronicling the growth of intergovernmental regulation and discussing the legal basis, the mechanisms, and the adverse effects of such regulation. The next two chapters analyze, respectively, the judicial and the legislative origins of intergovernmental regulation: chapter 2 examines the federal courts' application of constitutional provisions for regulation, their gradual assumption of managerial authority, and their role in future regulatory reform; chapter 3 discusses the history of legislated regulation, policy instruments selected by lawmakers, and political influences on intergovernmental regulation. Chapters 4 and 5 report the consequences of growing regulation for regulatory and regulated bodies: chapter 4 examines difficulties in writing and promulgating regulations, concerns about the scope of regulations, and enforcement problems; chapter 5 reviews research investigating how regulation affects state and local governments. Recent federal reform initiatives--procedural and substantive--are reviewed in chapter 6. Finally, chapter 7 presents six conclusions and recommends policies to reform intergovernmental regulation as a whole, a reform strategy for the newer forms of such regulation, and approaches to improving the regulatory process. (MCG)

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Foreword

During the past decade and a half, a wholly new development has surfaced in the field of intergovernmental relations: the emergence of a host of federal regulatory programs aimed at or implemented by state and local governments. With this regulatory spill-over from the traditional economic sphere, the nation's states and localities were conscripted into the battles over pollution, discrimination, civil rights, energy conservation and greater safety.

This trend was noted in an earlier ACIR report, *The Federal Role in the Federal System: The Dynamics of Growth,* published in 1981. That study concluded with the Commission's finding that

> Over the past 20 years the federal role has become *bigger, broader,* and *deeper*—bigger within the federal system, both in size of its intergovernmental outlays and the number of grant programs, broader in its program and policy concerns, and the wide range of subnational governments interacting directly with Washington; and deeper in its regulatory thrusts and preemptive proclivities.

Case studies prepared as a part of that report, particularly the volumes dealing with federal involvement in environmental protection, elementary and secondary education, and higher education showed a significant rise in national regulation and a growing state and local concern about rigid, intrusive, and sometimes costly requirements.

These developments are examined in more detail in this study. In it, the Advisory Commission on Intergovernmental Relations has probed the growth and operation of the new forms of intergovernmental regulation; identified and classified the major types of such regulations; analyzed their legal bases and treatment by the courts; traced their evolution through the nation's legislative process; reviewed the problems associated with rulemaking, administration, and enforcement; chronicled past efforts and present proposals for regulatory relief and reform; and sought to gauge some of the fiscal and administrative impacts of federal intergovernmental regulations on state and local governments. The seventh and final chapter of this report presents the findings and the issues raised by those findings, along with Commission's recommendations for reform.

The report was approved by the Commission at its meeting of December 2-3, 1982.

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Chapter 1

The Growth of Federal Intergovernmental Regulation: Origin and Issues

FROM SUBSIDY TO REGULATION

Traditionally, when federal policymakers have wished to encourage state and local governments to perform some particular activity or provide some particular service, they have relied upon the technique of *subsidization*. Although land grants were common during the 19th century—helping, among other things, to establish a system of state universities—by far the most common subsidy device since the 1880s has been the categorical cash grant-in-aid. According to an ACIR tabulation, at the end of 1980 there were about 540 funded special-purpose grants to the states and localities, for purposes ranging from airport planning to youth employment. Each provides a financial incentive to state and local officials (and voters) to do Washington's bidding.

Over the past two decades, however—and since 1969 in particular—there has been a dramatic shift in the way in which the federal government deals with states and localities. Although the upward climb in grant subsidies persisted during most of this era, federal policymakers also turned increasingly to new, more intrusive, and more compulsory *regulatory* programs to work their will. To cite just a few prominent examples, all or some state and local governments were mandated to:

- eliminate discrimination in public employment and federally assisted services;
- make their public transit systems fully accessible to the physically disabled;
- establish and enforce a 55 mile per hour maximum speed limit;
- upgrade the conditions of prisons and jails;
- offer classroom instruction in the native language of students with limited English-speaking abilities;
- provide wastewater treatment at advanced technological levels;
- protect the health and safety of workers in private industry;
- assure a free public education to all handicapped children.

At first, this "regulatory shift" attracted little public notice. For most of the 1970s, the intergovernmental agenda was dominated by problems relating to grants-in-aid, grant consolidation, and General Revenue Sharing. Over recent years, however, state and local government concern about federal "mandating" has become a prominent political issue. The Reagan Administration, in turn, has identified regulatory relief as a principal objective of its "New Federalism."

Even though the mandating issue burst suddenly into political awareness, it culminated a well established trend. The comprehensive ACIR study, *The Federal Role in the Federal System: The Dynamics of Growth,* clearly traced the rise of federal regulatory controls in several functional areas. Case studies profiling the development of national policy in the fields of elementary and secondary education, higher education, and environmental protection in particular noted a dramatic increase in regulatory initiatives during the past dozen years. In the field of pollution control, for example, the Commission's case analysis noted a progression from federal research (inaugurated in the late 1940s), to construction grants (beginning in the 1950s and expanded in the 1960s), to mandatory national standards imposed on state and local governments in the early 1970s.[1] Intergovernmental tensions rose simultaneously. As James Krier and Edmund Ursin observe,

> Whereas past policy reflected a sort of "cooperative federalism" consisting in some national but also considerable state authority, that of the present underscores "federal" and ... is distinctly uncooperative. Pollution policy is national policy, and the states are little more than reluctant minions mandated to do the dirty work—to implement federal directives often distasteful at the local level.... The fact that federal policy of today is simply the culmination of a slow but steady trend that began years ago should not obscure the essential difference between old policy and new, between federalism and federalization.[2]

Similar trends were noted in other fields studied. During the 1950s and 1960s, whether or not the federal government had a role to play in educational finance was the decisive issue. This question was resolved affirmatively by the passage of the *National Defense Education Act* in 1958 and, especially, with the *Elementary and Secondary Education Act* and the *Higher Education Act* in 1965. During the 1970s, however, new issues emerged. According to the Commission's study,

> ... the focus of policy debate in higher education has largely shifted from finance to regulation. . . . [C]oncern over a variety of federal regulations and grant conditions has increasingly become the subject of speeches, articles, editorials and reports. . . . Complaints range from increasing red tape and the administrative costs of regulatory compliance to the distortion of academic priorities and erosion of academic freedom.[3]

Similarly, "the focus of controversy has shifted to federal regulation" in the field of elementary and secondary education.[4]

Other close observers have noted a similar progression, suggesting dramatic changes in the balance of intergovernmental authority. According to two political scientists,

> Our federal system has evolved through a number of stages, each given appropriate labels by analysis. If we were to label the current trend, perhaps it should be best described as regulatory federalism.[5]

The policy concerns created by federal regulation of state and local governments are the subject of this report. Its aim is to trace the historical, legal, political and administrative background of the new federal intergovernmental regulation, and to offer the recommendations of the Advisory Commission on Intergovernmental Relations to make it at once less burdensome and more effective.

Distinguishing Subsidy and Regulation

Policy analysts—indeed, most observers of government—view regulation and subsidy as alternative strategies for influencing the conduct of individuals and organizations. This distinction is consistent with the common-sense meanings of the terms. According to Webster, a subsidy is a "grant or gift of money," while a regulation is a "rule or order having the force of law." That is, subsidies are incentives or rewards—the helping hand—while regulations are directives backed by sanctions or penalties—the mailed fist.[7]

Modern governments at all levels use a lot of both. Private individuals are subject to much regulation, including criminal and traffic laws. They also are the beneficiaries of a considerable number of subsidies, among them Medicare benefits, student loans, free public libraries, and tax deductions for charitable contributions. Businesses, too, are heavily regulated, and also may be eligible for certain subsidies: small business loans, special mailings privileges, tax abatements and a variety of other benefits.

Although the general meanings are clear, in practice a clear-cut demarcation between these two forms of policies is often difficult to draw. Many times, subsidy and regulation are used in combination. Both kinds of programs may be authorized in a single federal statute, and sometimes are entrusted to a single governmental agency. The western railroads in the 19th century and nuclear power in the 20th are examples of specific industries which were both promoted and controlled by government. Some analysts would argue that, in both cases, protective regulation itself became a kind of "subsidy." Similarly in recent years, the health care system has been both heavily subsidized (via Medicare and Medicaid) and increasingly regulated.

A clear distinction between regulation and subsidy is even more difficult to make where intergovernmental programs are concerned. Few federal programs affecting state and local governments are pure types. *All* subsidies are accompanied by regulations, and many regulations are tied, in some manner, to subsidies.

Every grant-in-aid program—including General Revenue Sharing, the least restrictive form of aid—comes with federal "strings" attached. Here, as in other areas, there is no such thing as a free lunch. Program conditions—specifying the purposes for which funds can be spent, as well as application procedures, planning requirements, audit provisions and other administrative standards—have long been a part of intergovernmental relationships. Although the earliest grants had few administrative controls—and these few were poorly enforced—provisions assuring federal oversight became commonplace in the first decades of this century.[8]

Despite the efforts of several recent Presidents to devolve decisionmaking through block grants and to standardize and simplify grant administration, federal "regulation" through such conditional grants has increased sharply over the past two decades. The more than 200 narrow-purpose categorical grants enacted during the Great Society era were followed by an additional 90-odd programs in the Nixon-Ford years and about 70 more during the Carter Administration. The drive for program consolidation during the 1970s eliminated only about 46 such grants, gently slowing—but certainly not stemming—the categorical tide. Not only did the number of programs increase, but the conditions associated with them in many cases became more detailed and intrusive.

At the same time, it also is true that most intergovernmental regulatory programs are linked in some manner to the grant-in-aid system. Some rely on federal fiscal leverage to accomplish their objectives, while others have grants associated with them to pay at least a portion of mandated costs. This overlap is illustrated by the manner in which Washington has relied chiefly upon the threat of the withdrawal of federal funds to advance nondiscrimination goals; by the fact that the same statute which established national clean water standards also created a very large construction grant to help pay the cost of meeting them; and by the combination of grant programs, court decisions, and executive branch rules which have advanced the cause of bilingual education in the schools.

In the intergovernmental sphere, then, regulation and subsidy are less like different parts of a dichotomy than opposing ends of a continuum. At one extreme is the general support grant with just a few associated conditions or rules; at the other is the costly, but wholly unfunded, national "mandate." In between are many programs combining subsidy and regulatory approaches, in varying degrees and in various ways.

Still, if facile distinctions cannot be made, the two polar types must be stressed. To paraphrase Orwell, all programs are regulatory, but some are more regulatory than others. Despite the conditions which are universally associated with them, grants-in-aid must be classified primarily as "subsidy" rather than "regulatory" programs, and will be so regarded here.[9] The difference, as in conventional usage, has to do chiefly with the degree of *compulsion*.[10] One of the most important features of the grant-in-aid is that its acceptance is still viewed legally as entirely voluntary. No state or local government is required to receive funds or suffers any sort of legal or additional financial penalty if it chooses not to do so. Although it is difficult for many jurisdictions to forego substantial financial benefits, this option remains real. Witness Arizona's long-standing refusal to participate in Medicaid, the largest of all federal assistance programs.

Secondly, most grant-in-aid conditions affect only the administration of those activities funded in whole or in part with federal funds. Although some exceptions may be noted, their compass is usually narrow and directly related to the purpose of the specific program.

Finally, grants-in-aid generally provide significant benefits to the recipient jurisdiction. That is, they help a state or local government to meet their own needs by increasing fiscal resources. Although federal program conditions may raise total costs, these are usually more than offset by federally offered funds.

In sum, the prototypical grant program is voluntary, imposes requirements directly related to the purpose of the program, and can offer substantial fiscal benefits to the recipient. For these reasons, and in order to highlight the important differences between the new "mandating" issue and long established concerns over "categorical red tape," traditional grant-in-aid conditions tied to the acceptance of a single program are generally excluded from this study of the new intergovernmental regulation.

What are termed intergovernmental regulatory programs in this report involve more substantial elements of coercion. Voluntariness is greatly reduced or lost by the presence and possible application of legal or fiscal sanctions. Many requirements have far-reaching impact, and the beneficiary relationship is often reversed. Thus, while the typical federal grant offers resources which "assist" a state or local government in the pursuit of its program objectives, in the typical regulatory program state and local governments involuntarily "assist" Washington in accomplishing national policy goals. Under recent laws, for example, state and local officials have been charged with *enforcing federal standards* (in such areas as clean air, occupational safety, highway traffic speeds and surface mining); with *implementing federal policies* (relating to such objectives as bilingual education and health cost control); and with *contributing state and local fiscal resources* to serve federal ends (as in education for the handicapped, water quality, prison improvements, and billboard removal).

Thus, the prototypical regulatory program is involuntary, usually imposes far-reaching requirements, and frequently involves substantial unreimbursed costs for affected jurisdictions. Programs of this kind have been established in a number of different ways, which are treated below.

SOURCES OF INTERGOVERNMENTAL REGULATION

Though administrators interpret the laws and enforce the rules, federal intergovernmental regulation ultimately stems from two basic sources—the courts and Congress. Actions of each have contributed significantly to the erosion of state and local discretion.

Many constraints are constitutional in nature, chiefly derived from interpretations of the post-Civil War amendments. Under the 14th amendment, state and local governments are bound to respect the rights of individuals to "due process of law" and "equal protection of the laws," while the 15th amendment prohibits discriminatory voting practices. Over the past half-century, the Supreme Court gradually expanded its interpretation of these requirements, bringing much of the Bill of Rights under the coverage of the 14th amendment.

In terms of historical order, these "mandates" take precedence, for federal judges assumed an "activist" posture regarding the regulation of state and local governments in the 1950s, well before the President and Congress did. Many of the decisions have been quite far reaching. For example, in well-known cases, the Supreme Court has required state and local governments to:

- ☐ reapportion their legislatures on the basis of "one man-one vote" principles;
- ☐ eliminate prescribed prayers and other forms of religious observance in public schools;
- ☐ notify defendants in criminal proceedings of their rights prior to detention and questioning;
- ☐ end legal restrictions on abortion;
- ☐ provide legal counsel to indigent defendants facing criminal charges; and
- ☐ eliminate racial segregation in the public schools.

As the foregoing list suggests, some court orders have prohibited certain activities and policies. These are better described as "constraints" than "mandates." In other instances, however, judges have placed strong, affirmative obligations on states and communities. Some school integration plans, for example, have entailed extremely close judicial supervision of most aspects of school administration. In certain fields, court orders have imposed substantial fiscal, legislative, and administrative burdens. This is particularly true regarding the condition of institutions for the mentally ill or mentally retarded, prison systems, jails and juvenile detention systems. Thus, federal judges

> . . . have ordered at least 11 states to overhaul their facilities for the mentally ill or mentally retarded, eleven states and local governments in seven other states to revamp their prison systems, and six states to improve their juvenile detention facilities. . . . The decrees in these cases mandate massive changes in the operation of an institution and its programs, changes involving the physical condition of the facility, its staffing, the quantity of its services, or a combination of these items.[11]

While such court orders clearly are significant, federal regulations have much more commonly been imposed on state and local governments by action of the Congress and President, through the legislative process. The greater number of those regulatory statutes were adopted during the past two decades. Although no complete inventory is available, many of the most significant are listed in *Figure 1–1.* (Additional information about each of these programs is presented in *Appendix Figure 1–A*).

As this table indicates, much of the growth of intergovernmental regulation took place during the period when the "New Federalism" of the Nixon and Ford Administrations also was at its height. Although the initial forays occurred during the Johnson years, 21 of the 34 regulatory statutes—including nearly all of the most far-reaching ones—were enacted between 1969 and 1976. Thus, though few noted it at the time, this period saw a dramatic shift in the character of intergovernmental relations. Just as the mid-60s was marked by an "explosion" of categorical grants-in-aid, the first part of the last decade was characterized by a proliferation of new regulatory programs.

In large part, this rapid growth occurred because state and local governments were given major roles in implementing portions of the "new social regulation." This now widely used term refers to the panoply of environmental,

Figure 1–1

Major Statutes of Intergovernmental Regulation, 1960–80

1964	*Civil Rights Act* (Title VI)
1965	*Highway Beautification Act*
	Water Quality Act
1966	*National Historic Preservation Act*
1967	*Wholesome Meat Act*
1968	*Civil Rights Act* (Title VIII)
	Architectural Barriers Act
	Wholesome Poultry Products Act
1969	*National Environmental Policy Act*
1970	*Occupational Safety and Health Act*
	Clean Air Act Amendments
	Uniform Relocation Assistance and Real Property Aquisition Policies Act
1972	*Federal Water Pollution Control Act Amendments*
	Equal Employment Opportunity Act
	Education Act Amendments (Title IX)
	Coastal Zone Management Act
	Federal Insecticide, Fungicide, and Rodenticide Act
1973	*Flood Disaster Protection Act*
	Rehabilitation Act (Section 504)
	Endangered Species Act
1974	*Age Discrimination Employment Act*
	Safe Drinking Water Act
	National Health Planning and Resources Development Act
	Emergency Highway Energy Conservation Act
	Family Educational Rights and Privacy Act
	Fair Labor Standards Act Amendments
1975	*Education for All Handicapped Children Act*
	Age Discrimination Act
1976	*Resource Conservation and Recovery Act*
1977	*Surface Mining Control and Reclamation Act*
	Marine Protection Research and Sanctuaries Act Amendments
1978	*National Energy Conservation Policy Act*
	Public Utility Regulatory Policy Act
	Natural Gas Policy Act

health, safety, consumer protection, and nondiscrimination legislation adopted over the past two decades, much of it aimed at influencing the conditions under which goods and services are produced and the physical characteristics of manufactured products.[12]

This body of law contrasts with the more traditional "old economic regulation." Earlier federal regulation of business concentrated chiefly on the conditions of entry and rates charged in particular industries, and usually was administered by independent national commissions. The Interstate Commerce Commission, created in 1887, set the pattern; it was followed by the Federal Trade Commission (1914), the Federal Power Commission (1930), the Federal Communications Commission (1935), the Civil Aeronautics Board (1938), and the Atomic Energy Commission (1946), among others. State and local governments played no major role in most of these activities, and were affected by them chiefly in that their own regulatory powers were preempted, in whole or part, by national law.

Especially in the past two decades, however, federal controls have been instituted over the nonmarket behavior of business firms as well. Much of this legislation has been associated with political movements involving civil rights, consumer protection, improved health and safety, and environmental protection. Although some of the new social regulation has been entrusted to independent commissions—including the Equal Employment Opportunity Commission (1964) and the Consumer Product Safety Commission (1972)—and are direct federal responsibilities, more has been delegated to such line departments as the Environmental Protection Agency, the Department of Labor, the Department of Health and Human Services, and the Department of Education. Many of these latter regulatory programs, in turn, actually are implemented by the states and localities. The Environmental Protection Agency, for example, relies almost entirely on intergovernmental means to accomplish its objectives. Auto emissions control is the major instance in which regulatory authority was vested directly in EPA's own administrators.[13]

In these intergovernmental regulations fields, state and local governments serve as an intermediary between the federal government on the one hand and private business firms on the other. They are regulated in order to regulate others. This approach constitutes one major form of intergovernmental regulation.

A second approach is reflected in cases where state and local government practices and services are the ultimate target of federal regulation. Witness federal statutes mandating the elimination of discrimination in state and local services and employment, an end to the dumping of wastes into ocean waters, and the provision of education to handicapped children. Here, the private sector is not affected. Rather, governmental regulation is aimed at government itself.

THE TECHNIQUES OF INTERGOVERNMENTAL REGULATION

8

As was noted previously, an element of *compulsion* is one key feature of the new intergovernmental regulation that distinguishes it from the usual grant-in-aid conditions. The requirements traditionally attached to assistance programs may be viewed as part of a contractual agreement between two independent, coequal levels of government. In contrast, the policies which the new intergovernmental regulation imposes on state and local governments are more nearly mandatory. They cannot be side stepped, without incurring some federal sanction, by the simple expedient of refusing to participate in a single federal assistance program. In one way or another, compliance has been made difficult to avoid.

A variety of legal and fiscal techniques have been employed by the national government to encourage acceptance of its regulatory standards. Four major strategies—direct orders, crosscutting requirements, crossover sanctions, and partial preemption—are described below and are summarized in *Figure 1–2.*

Direct Orders

In a few instances, federal regulation of state and local government takes the form of direct legal orders that must be complied with under the threat of civil or criminal penalties. For example, the *Equal Employment Opportunity Act of 1972* bars job discrimination by state and local governments on the basis of race, color, religion, sex and national origin. This statute extended to state and local governments the requirements imposed on private employers since 1964. Similarly, the *Marine Protection Research and Sanctuaries Act Amendments of 1977* prohibit cities from disposing of sewage sludge through ocean dumping. Court orders based on Constitutional provisions, like those banning segregated schools, are similar in nature.

For the most part, however, Washington has exempted subnational governments from many of the kinds of direct regulatory statutes that apply to businesses and individuals. Hence, although state governments may administer the *Occupational Safety and Health Act,* they (and local governments) are exempt from its provisions in their capacity as employers—as is the federal government itself. Politics often has dictated this course, but there also are some Constitutional restrictions on the ability of Congress to regulate directly. The wage and hour requirements imposed on state and local governments by the 1974 amendments to the *Fair Labor Standards Act* were greatly circumscribed by the Supreme Court in *National League of Cities v. Usery* (1976).[14] The Court's ruling held that the law interferred with their "integral operations in areas of traditional governmental functions", and thus threatened their "independent existence".

In this respect, the relationship of the federal government with the states and localities must be contrasted with that of the states and their own local subdivisions. Because local governments are creatures of state law, state

Figure 1–2

A Typology of Intergovernmental Regulatory Programs

Program Type	Description	Major Policy Areas Employed
Direct Orders	Mandate state or local actions under the threat of criminal or civil penalties	Public employment, environmental protection
Crosscutting Requirements	Apply to all or many federal assistance programs	Nondiscrimination, environmental protection, public employment, assistance management
Crossover Sanctions	Threaten the termination or reduction of aid provided under one or more specified programs unless the requirements of another program are satisfied	Highway safety and beautification, environmental protection, health planning, handicapped education
Partial Preemptions	Establish federal standards, but delegate administration to states if they adopt standards equivalent to the national ones	Environmental protection, natural resources, occupational safety and health, meat and poultry inspection

"mandating" through direct orders is both legally permissible and very frequent.[15]

Much more commonly, then, Washington has utilized other regulatory techniques to work its will. These may be distinguished by their breadth of application and the nature of the sanctions which back them up.

Crosscutting Requirements

First, and most widely recognized, are the crosscutting or generally applicable requirements imposed on grants across the board to further various national social and economic policies. One of the most important of these requirements is the nondiscrimination provision included in the Title VI of the *Civil Rights Act of 1964,* which stipulates that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance.[16]

Since 1964, crosscutting requirements have been enacted for the protection of other disadvantaged groups (the handicapped, elderly, and—in education programs—women). The same approach was utilized in the environmental impact statement process created in 1969, as well as for many other environmental purposes. It also has been extended into such fields as historic preservation, animal welfare and relocation assistance.[17] A total of some 36 across-the-board requirements dealing with various socio-economic issues, as well as an additional 23 administrative and fiscal policy requirements, were identified in a 1980 OMB inventory.[18] These are listed in *Appendix Figure 1–B.* Of the former group, the largest number involve some aspect of environmental protection (16) and nondiscrimination (9). Two-thirds of the 59 requirements have been adopted since 1969.

Crosscutting requirements have a pervasive impact because they apply "horizontally" to all or most federal agencies and their assistance programs. In contrast, two other new forms of intergovernmental regulation are directed at only a single function, department or program. Thus, both can be described as "vertical" mandates.[19]

Crossover Sanctions

One approach relies upon the power of the purse. It imposes federal fiscal sanctions in one program area or activity to influence state and local policy in another. The distinguishing feature here is that a failure to comply with the requirements of one program can result in a reduction or termination of funds from another, separately authorized and separately entered into, program. The penalty thus "crosses over".

The history of federal efforts to secure the removal of billboards from along the nation's major highways illustrates the use of the traditional financial "carrot" along with this new financial "stick."[20] Beginning in 1958, the federal government offered a small bonus in the form of additional highway funds to states that agreed to regulate billboard advertising along new interstate highways. By 1965, however, only half of the states had taken advantage of this offer—not enough to suit the Johnson White House.

A dramatic change occurred with the adoption of the *Highway Beautification Act of 1965*. The bonus system was dropped, and Congress substituted the threat of withholding 10% of a state's highway construction funds if it did not comply with newly expanded federal billboard control requirements. Despite the bitter opposition of the outdoor advertising industry, 32 states had enacted billboard control laws by 1970, though only 18 of these were judged to be in full compliance. Nearly all of the rest of the states fell quickly into line when Congress made appropriations to compensate for part of the cost of removing nonconforming signs, and the Federal Highway Administrator stepped up his pressure on them.

A similar fiscal penalty subsequently was employed in a number of other programs. In the wake of the OPEC oil embargo, federal officials urged the states to lower their speed limits and the Senate adopted a resolution to that effect. Twenty-nine states responded to this effort at "moral suasion". But these pleas were quickly replaced by a more authoritative measure: the *Emergency Highway Energy Conservation Act of 1974*, which prohibited the Secretary of Transportation from approving any highway construction projects in states having a speed limit in excess of 55 mph. All of the remaining states responded within two months.

Partial Preemption

The crossover sanctions, like the crosscutting requirements, are tied directly to the grant-in-aid system. Federal power in these cases derives from the Constitutional authority to spend for the general welfare. A final innovative technique, however, has another basis entirely. It rests on the authority of the federal government to preempt certain state and local activities under the supremacy clause and the commerce power.

Yet, this is preemption with a twist. Unlike traditional preemption statutes, preemption in these cases is only *partial*. Federal laws establish basic policies, but administrative responsibility may be delegated to the states or localities if they meet certain nationally determined conditions or standards.

The *Water Quality Act of 1965* was an early example of this strategy, which one analyst describes as the "if-then, if-then" approach. The statute was the first to establish a national policy for controlling pollution. Although the law allowed each state one year to set standards for its own interstate waters, the Secretary of Health, Education, and Welfare was authorized to enforce federal standards in any state that failed to do so. That is,

> . . . *if* a state does not issue regulations acceptable to the U.S., *then* a federal agency or department will do so, and *if* the state does not adopt and enforce these regulations, *then* the federal level of government will assume jurisdiction over that area.[21]

This same technique—which others have called the "substitution approach" to federalism[22]—has since been extended to a variety of other areas. For example, the OSHA law asserts national control over workplace health and safety but permits states to operate their own programs if their standards are "at least as effective" as the federal ones.

The most far-reaching applications, however, is in the *Clean Air Act Amendments of 1970*. This path-breaking environmental statute set federal air quality standards throughout the nation, but required that the states devise effective plans for their implementation and enforcement. Its compass is great: for example, EPA can require states to change their own transportation policies (perhaps by giving additional support to mass transit) or to regulate private individuals (as in establishing emission-control requirements and inspection programs for automobiles).[23] Two close observers comment:

> Of all the intergovernmental mechanisms used to nationalize regulatory policy, none is more revolutionary than the approach first applied in the *Clean Air Act Amendments of 1970*. It is an approach minimizing both the voluntariness of state and local participation and the substantive policy discretion provided for officials in subnational governments. In fact, it is a mechanism which challenges the very essence of federalism as a noncentralized system of separate legal jurisdictions and instead relies upon a unitary vision involving hierarchically related central and peripheral units. . . . [i]t is an approach allowing national policymakers and policy implementors to mobilize state and local resources on behalf of a national program. As preliminary measures, these resources can be mobilized using technical, financial, or other forms of assistance, but underlying this mechanism is the ability of national officials to formally and officially "draft" those resources into national service. We call this *legal conscription*.[24]

Applications and Combinations

These four techniques—direct legal orders, crosscutting requirements, crossover sanctions and partial preemption—are the major new statutory tools in the federal government's kit for the regulation of states and localities. Each has distinctive characteristics, and poses special problems of policy, law, administration, finance and politics.

Appendix Figure 1–A classifies each of the statutes listed in *Figure 1–1* according to this fourfold grouping. Among the major regulatory statutes examined, crosscutting requirements (18) and partial preemptions (13) clearly are relatively numerous, while crossover sanctions (6) and direct orders (6) are relatively rare.

It also should be noted that these devices have sometimes been combined. A good example is provided by the 1970 *Clean Air Act Amendments*. Basically, the law relies upon the technique of partial preemption. States must prepare State Implementation Plans (SIPs) which will control pollution to the extent necessary to achieve federal air quality standards. These must be approved by the Environmental Protection Agency. If the EPA judges a SIP to be inadequate, it must disapprove the SIP. In the event that a state fails to make necessary revisions, EPA is required to promulgate an adequate SIP.

This, however, is not the only sanction imposed by the act. More teeth are added by Section 176(a), which bars both the EPA and the Department of Transportation from making grant awards in any air quality control region which has not attained primary ambient air quality standards and for which the state has failed to devise adequate transportation control plans. This, of course, is a tough crossover sanction. Furthermore, Section 176(c) prohibits any agency of the federal government from providing financial assistance to any activity which does not conform to a state SIP. This provision uses the crosscutting requirement approach to strengthening SIP implementation.

Fund termination, as in crossover sanctions, also is used to enforce compliance with a number of the crosscutting requirements relating to nondiscrimination. Discriminatory actions can result in the cutoff of aid, not only in the program area in which discrimination was found, but to an entire institution or jurisdiction.

ISSUES AND IMPACTS

Especially in the past four years, the growing federal regulatory presence has become a major concern of intergovernmental policymakers. State and local officials have sounded the alarm against costly federal mandates and unreasonable federal intervention into their affairs. Even some liberals have objected to the fiscal strains and policy controls imposed on hard-pressed cities and states, while conservatives—who had always warned that federal controls would follow federal dollars—seem to have been proven right. In mid-1980, a *New York Times* editorial observed that

> Local governments are feeling put upon by Washington. Each new day seems to bring some new directive from Congress, the courts or the bureaucrats: cities must make public buildings accessible to the handicapped; states must extend unemployment compensation to municipal and county workers, and on and on. The mandates are piling up so fast that liberal governors and mayors are enrolling in a cause once pressed only by arch-conservatives.[25]

Mayors and county officials—responding to the double whammy of federal as well as state mandates—have been especially vocal, and all the major research studies to date have focused on the impact of federal regulations on the nation's cities and counties. New York's Mayor Ed Koch, in a widely read 1980 critique, called attention to the "maze of complex statutory and administrative directives [that] has come to threaten both the initiative and financial health of local governments throughout the country."[26] While Koch indicated his general support of the broad policy objectives which mandates are meant to serve, he warned of the "lack of comprehension by those who write them as to the cumulative impact on a single city, and even the nation."[27] Federal "mandate mandarins", he charged, have hung a "mandate millstone" around the necks of the nation's cities.

Koch's views have much support among his municipal, county, and state colleagues. City officials responding to a 1981 Natonal League of Cities survey identified federal wastewater treatment, environmental impact, handicapped access and safe drinking water regulations as especially burdensome and most urgently in need of modification. Reforms also were called for in many other areas.[28] That county officials share these perspectives is suggested by the fact that the National Association of Counties selected "Controlling Mandates" as the theme for its 1981 annual conference. Similarly, a joint statement issued in November 1980, by the executive committees of the National Governors' Association and the National Conference of State Legislatures pushed for the enactment of "fiscal note" procedures as a "first step" in controlling federal mandates. It also contended that,

> . . . if a situation is of such compelling national concern as to prompt enactment of a federal program to respond to it, the federal government should normally fund that program.[29]

National officials, too, have been disturbed by the rising tide of regulatory efforts. Joseph A. Califano, an HEW Secretary during the Carter years, recalls that "Our big trouble wasn't with the old Great Society programs. It was with the explosion of regulation from the 1970s."[30] And the view of many in the Reagan Administration was aptly summarized by Murray L. Weidenbaum, then the chairman of the Council of Economic Advisers and a noted expert in the regulatory field. "In the past decade," Weidenbaum wrote,

> we have seen a boom in social regulation with devastating consequences for the federal system. The federal government, through many of its regulatory actions, has reduced the autonomy of state and local governments and centralized the responsibility for many important programs. This loss of autonomy has weakened the states and reduced their independence, while the centralization of responsibilities better handled at the state and local levels has limited the effectiveness of the federal government.[31]

Seven Problems

Although particular problems vary from program to program, critics have leveled at least seven frequent charges against federal intergovernmental regulations singly and as a whole. The new mandates, they believe, are too often *expensive, inflexible, inefficient, inconsistent, intrusive, ineffective* and *unaccountable*. Each of these interrelated concerns is illustrated, with a single example, in the discussion below.

COST

Given the fiscal pinch caused by an unstable economy, the federal aid slowdown, and taxpayer revolts, it is not surprising that the costs imposed by federal mandates have been a major, perhaps even preeminent, concern. Simply put, state and local government officials object to footing part of—or, in some cases, most of—the bill for someone else's program. What Washington wants done, many believe, Washington also should be willing to pay for.

Accurate information on the total cost of implementing federal mandates nationwide simply is not available. However, of the six major programs examined in an Urban Institute report, the *1977 Clean Water Act* imposed by far the largest fiscal costs on the seven cities and counties studied.[32] This act, which supplemented and modified the far-reaching *Water Pollution Control Act Amendments of 1972*, requires the development and implementation of wastewater treatment management plans that meet pollution discharge standards set by the Environmental Protection Agency. The act also authorized a very large construction grant program covering 75 to 85% of construction and conversion costs, but the balance is borne by local (and, in some instances, state) governments. No aid is provided for operating and maintenance expenses.

According to the Urban Institute report, the cost of meeting these requirements ranged from zero in Burlington, VT—where a new plant already was under construction to meet state standards—to $51.8 million in capital outlays, plus an additional $10.4 million in operating expenses, in Newark, NJ. Here, as in many other states, a portion of this cost was borne by the state government. However, local outlays totalled $62.54 per capita for capital improvements and $31.42 per capita for operating expenses.[33]

As these examples show, the costs of implementing federal regulatory programs can vary widely from place to place. But, EPA estimated in 1980 that cities, nationwide, would have to spend more than $30 billion to build additional wastewater treatment plants to comply with the *Clean Water Act's* standards for 1983.[34] Even with such large expenditures, there is no assurance that the objectives of the program will be realized. GAO audits have concluded that, as a result of design and operating deficiencies, many of the plants built so far are unable to meet national performance standards. These failures, according to the GAO, "may represent the potential waste of tens of millions of dollars in federal, state and local monies."[35]

INFLEXIBILITY

Closely following cost as a concern of state and local officials are problems of inflexibility in federal regulatory programs. Washington, they believe, has too often prescribed rigid policies and performance standards, regardless of the varying circumstances in which they are to be applied.

Perhaps no area better illustrates state and local concerns about federal inflexibility than the bilingual education regulations proposed by the Carter Administration and withdrawn by the Reagan Administration early in 1981. Although Washington encouraged bilingual education with federal aid for over a decade, a strong regulatory role dates from the 1974 decision of the Supreme Court in *Lau v. Nichols*.[36] Responding to a complaint of some Chinese-American parents in San Francisco, the Court held that the *Civil Rights Act of 1964* prohibited school districts from taking a "sink or swim" approach to the education of non-English speaking students.

The Court instructed HEW to develop appropriate regulations, but specified no particular approach. Indeed, the decision states that, "Teaching English to the student of Chinese ancestry is one choice. Giving instruction to this group in Chinese is another. There may be others." However, the regulations drafted by the Department of Education required that students with limited proficiency in English be offered subject-matter courses in their native language wherever there were 25 or more students in two consecutive grades. Alternative approaches, including "immersion" and "English as a Second Language" (ESL) instruction, were generally precluded. A failure to conform to national standards could result in a cutoff of education aid.

The proposed regulations were greeted with vociferous opposition from many state, local, and education groups. Many of these critics supported the use of bilingual education in certain areas—for example, in inner city or Southwestern school districts with large Spanish-speaking populations. And cost was not the major issue, because most schools already provided special instruction for their non-English speaking students.[37] What was objectionable was the rigid federal stipulation of a particular instructional technique, to the exclusion of others. Where, critics asked, can a city find qualified subject-matter teachers fluent in Vietnamese or Ilokano (a language of the Phillippines)?[38] Why should Fairfax County, VA, not be allowed to continue its program of special instruction in English for its students from more than 50 different foreign langauge backgrounds?

To many state and local officials, there was no satisfactory answer. A statement prepared by the National Governors' Association, the National Conference of State Legislatures, the Council of Chief State School Officers, and the National Association of State Boards of Education charged that "a national prescription of a single approach to instruction to the exclusion of other alternative methods is educationally without merit and would be a disservice to many children who can benefit more from other methods of instruction."[39]

INEFFICIENCY

Efficiency is a matter of the bang for the buck. To be "efficient" in economic terms, the benefits from a program should exceed its costs. Furthermore, the efficiency criterion dictates that a choice between two or more equally effective means should be decided in favor of the least expensive one.

Too often, critics believe, Washington has ignored these obvious prescriptions. The benefits of regulations have been poorly specified, while the likely costs to be imposed have sometimes been wholly ignored. Federal officials frequently have latched onto very costly techniques or standards as the one-and-only way to meet national goals, even when more economical approaches were available.

Perhaps no regulatory policy has come under as much criticism on efficiency grounds as the Department of Transportation's regulations written to carry out Section 504 of the *Rehabilitation Act.* This crosscutting requirement, intended to bar discrimination against the handicapped, was interpreted by DOT in 1979 to require full access to existing transit systems, while prohibiting the use of much cheaper and more flexible paratransit alternatives.

This decision was a costly one and was greeted with protests from transit officials around the nation. Chicago's hardpressed Regional Transit Authority claimed that retrofitting its system would cost more than all the capital invested in its since 1890, and the shaky New York Metropolitan Transportation Authority spoke of the dangers of bankruptcy.[40] An independent study by the Congressional Budget Office also warned of inefficiency. It noted that the rules,

> require transit systems to equip buses with lifts for wheelchairs, to install elevators in many underground and aboveground rail stations, and to modify rail cars to accommodate the wheelchairs. While the program would be very expensive—$6.8 billion over the next 30 years—relatively few handicapped persons would benefit from it.[41]

The CBO study estimated that the cost of providing full wheelchair access to mass transportation would average about $38 per trip.[42] It indicated that alternative approaches—such as special taxi service or helping the severely disabled to purchase and equip their own cars—could serve many more handicapped persons at lower cost.

In July 1981, it should be noted, the Department of Transportation issued a revised and far more flexible interim rule which allows grant recipients to certify that some form of special effort is being made to provide transportation for handicapped persons. The new rules followed an Appeals Court decision that the department had exceeded the authority provided by Section 504.[44]

INCONSISTENCY

The problem of inconsistency is a special curse of the crosscutting requirements. While most of these stem from a single statutory enactment, the requirements are interpreted and enforced by each grant-awarding agency, usually with some guidance from a designated "lead agency." As a result, there may be significant differences in the manner in which federal requirements are applied in particular programs. A 1980 OMB study noted:

> In too many cases, a single generally applicable requirement has been implemented differently for several assistance programs. The result is that a recipient of several agencies may receive inconsistent or conflicting instructions for meeting a single requirement.[45]

William G. Colman, a governmental affairs consultant and former ACIR executive director, made the same point more strongly, testifying that,

> . . . delegation of enforcement powers to each granting agency for governmentwide statutory environmental, civil rights, affirmative action, planning and other requirements presents recipient state and local governments with administrative chaos defying description.[46]

Questions of policy and administrative coordination have been an important issue in the drive to eliminate discrimination against blacks, ethnic minorities, the elderly, women and the handicapped. Individual agencies have followed different patterns in the interpretation of such across-the-board requirements as Title VI of the *Civil Rights Act* and Section 504 of the *Rehabilitation Act*. Furthermore, in addition to the series of nine crosscutting requirements in this field, separate civil rights protections have been written into many particular programs, including general revenue sharing, the *Safe Streets Act*, and the *Housing and Community Development Act*. As a consequence, state and local officials have been faced with a confusing array of sometimes-conflicting goals, standards, procedures, and timetables. Richard B. Capalli contends that "the nondiscrimination rules provide the best example of helter-skelter federal decisionmaking."[47] He notes that a typical elementary and secondary school district, engaging in one act of discriminatory conduct against a single individual,

> becomes subject to 24 separate enforcement actions brought by eight different parties under nine distinct federal laws. . . . These federal equality rules have been layered with little or no concern for redundancy, consistency, overlap or logic.[48]

INTRUSIVENESS

It is one thing, of course, for the national government to tell state and local governments "what" they must do. That, very often, has been objectionable enough. But it is yet another thing to tell them not only what they must do but exactly *how* they should do it. Many intergovernmental regulatory programs in fact do carry with them rather detailed organizational and procedural standards. At times, state and local officials believe, Washington has intruded into areas that, by tradition and even the Constitution, are their own business.

The National Health Planning and Resources Development Act of 1974 (PL 93–641) is a case in point. This act created a new health planning and regulatory network at the state and local levels and prescribed, in great detail, that network's structure and functions. Born out of Washington's concern with the inflationary impact of rising health care costs, PL 93–641 required each state to designate a State Health Planning and Development Agency (SHPDA); the delineation of local health service areas; and the formation in each area of a consumer-and-provider controlled Health Systems Agency (HSA).

Most importantly, every state also was required to enact certificate-of-need (CON) legislation meeting minimum federal standards. These CON programs set up a review process whereby the SHPDA must approve all major capital development projects undertaken by health care facilities. Moreover, states were empowered to periodically review the "appropriateness" of institutional health services. The HSAs were authorized to review and approve or disapprove a variety of federal health funds coming into their areas.

This highly prescriptive and extremely detailed statute also was backed by an unusually harsh fiscal sanction. A state's failure to comply jeopardized its entitlement, not just to the planning funds made available under the act, but to a variety of programs for public health services, community mental health, and alcohol abuse as well. For these reasons, attorney Thomas J. Madden has declared that "the *Health Planning Act* intrudes upon state and local operations to a greater degree than almost any other grant program."[49]

State and local opposition to some provisions of the *Health Planning Act* resulted in a series of political and legal confrontations, including arguments that the law is unconstitutional. The State of North Carolina protested that it was being forced to regulate the actions of private health care institutions—contrary to its own state constitution—or forego participation in some 42 federal assistance programs. This, it believed, represented unlawful coercion and was a violation of basic states' rights protected by the Tenth Amendment. Similarly, Montgomery County, MD, challenged the provisions that allow local HSA's to make decisions which cannot be overruled by local county governments.

Neither case was successful, however. In *North Carolina v. Califano* (1978), the U.S. Supreme Court upheld the act as a valid exercise of the spending power, and a U.S. District Court reached the same conclusion in *Montgomery County, MD v. Califano* (1979). Both regarded the law as essentially a "cooperative venture" between governments, offering inducements for state action, but not coercing it.

INEFFECTIVENESS

As the foregoing suggests, state and local officials have raised a variety of objections to the federal regulations which have been imposed upon them. But another sort of concern has been voiced chiefly by others. These critics doubt that the mounting paperwork and red tape, the mandated expenditures, and federal intrusions into local decisionmaking have reaped commensurate benefits in the quality of human life.

Many policy analysts—particularly, many economists—believe that regulatory programs have been rather ineffective in achieving social and environmental objectives. For example, Lester B. Lave, the author of a recent Brookings Institution study, contends that "social regulation is in trouble, not because it is too costly, but because it is ineffective in accomplishing social goals."[50] Many analysts also argue that alternative implementation strategies might prove more successful. At the same time, members of the intended beneficiary groups frequently protest that Washington has failed to follow through adequately on the commitments enshrined in law. For different reasons, then, both sets of critics argue that, in practice, many intergovernmental regulatory programs have not worked very well.

The *Occupational Safety and Health Act* (OSHA) would be high on many people's list as an example of an ineffective regulatory program. Launched with high hopes—one legislative sponsor expected a 50% reduction in job-related accidents by 1980—OSHA instead became a symbol of bureaucratic red tape and bumbling. Its thousands of regulations and standards had little measurable effect on worker safety. According to evaluative reports,

> . . . it is clear that OSHA's impact on injuries has been minimal. Most studies have been unable to find any statistically significant improvement. The most optimistic estimate, based on a study of "preventable" accidents in California, suggests a 2% to 3% reduction in injuries and a 5% decline in deaths. There is no evidence that injury rates decrease after a firm is inspected. No reliable data are available on OSHA-induced trends in occupational illnesses, but there is little reason to believe that there have been significant improvements given the limited attention devoted to health hazards by OSHA in the past.[52]

UNACCOUNTABILITY

A final problem posed by intergovernmental regulation relates to the democratic process itself. "Who is responsible?" is the basic question. "Not me" often is the official reply.

To many critics, regulatory policies seem to bring out the worst in both federal legislators and bureaucrats.[33] It is too easy for officials to consider only the broad objectives of a program and ignore operational realities. It is simpler to frame standards to fit the few worst cases, but neglect the impact upon other jurisdictions. And it is tempting to forget the costs of achieving national goals when the money being spent must be raised by a lower level of government, rather than by Washington itself.

Furthermore, the complex chain of events from enactment, to administrative interpretation, to adjudication, through final execution at the state and local level (or both) diffuses policy responsibility. In one too-common scenario, Congressmen blame bureaucrats for overzealous interpretations of legislative intent; bureaucrats blame Congress for either over-specificity or a lack of adequate guidance; state and local officials charge that their hands are tied by national requirements; and Washington points a finger at them for improper performance. Everyone, as often as not, blames the courts, although judges reply that they were only applying the law.

The problems of accountability in regulatory programs are aptly illustrated by the *Clean Air Act*. The joint federal-state system employed to establish and enforce air quality standards means that most voters find it difficult to know whom to blame for unpopular or unsuccessful policies. In this and similar partial preemption programs,

> the relationship between the levels of government has become so complex and intertwined ... that the average citizen is unable to comprehend the system or to determine who is responsible for failure to achieve goals. The lack of citizen understanding and the failure of the system to achieve Congressionally mandated goals suggest that consideration should be given to the relative advantages of alternative methods of achieving national goals.[54]

Reauthorization of the 185-page *Clean Air* legislation was forecast to be "as complicated as rewriting part of the Talmud" since "major policies are hidden in small phrases, subordinate clauses and fine print...."[55] Because of the intricacy of the issues involved, neither the nation's citizens nor most of its legislators were expected to play an effective role in the deliberations:

> "It's the kind of thing where a Congressman is going to say to the staff guy, 'Just tell me how to vote,' and the third-level bureaucrat is the one who's going to get the pressure because the agency administrator will have to take his word for it," said a former Senate staff worker, Only the few who care very much will be involved in the decisions.[56]

CONCLUSION

The substantial growth of intergovernmental regulation during the 1960s and 1970s brought to the fore a whole new set of complex, difficult and controversial policy issues. As this review shows, state and local officials object to mandated federal costs and protest the inflexibility, inefficiency, inconsistency and intrusiveness of the new forms of federal regulation. Other critics wonder if the new regulatory programs are very effective in accomplishing their objectives and whether national policies accurately reflect the views and preferences of the voting public and its elected representatives.

These problems and issues are explored in more detail in the balance of this report. *Chapter 2* explains the legal foundations of the new federal intergovernmental regulation, traces its origin to interpretations of specific Constitutional provisions, and describes the role played by the judiciary in scrutinizing federal regulation. *Chapter 3* probes the politics of intergovernmental regulation, noting factors which have encouraged the Congress and President to enact increasing numbers of these statutes over the past 15 years. *Chapter 4* is concerned with implementation issues—particularly problems relating to rulemaking and enforcement—while *Chapter 5* examines the impact of federal regulation on states, cities and counties as indicated in recent research reports.

Against this analytical backdrop, *Chapter 6* summarizes alternative approaches to regulatory reform, concentrating particularly on actions during the Carter and early Reagan Administrations, as well as current proposals. *Chapter 7* presents key summary findings and conclusions from the entire study and offers this Commission's own strategy for reforming federal regulation of state and local governments.

FOOTNOTES

[1] Advisory Commission on Intergovernmental Relations, *Protecting the Environment: Politics, Pollution and Federal Policy*, A–83 (Washington, DC: U.S. Government Printing Office, 1981).

[2] James A. Krier and Edmund Ursin, *Polution and Policy* (Berkeley, CA: University of California Press, 1977), pp. 297–98.

[3] Advisory Commission on Intergovernmental Relations, *The Evolution of a Problematic Partnership: The Feds and Higher Ed*, A–82 (Washington, DC: U.S. Government Printing Office, 1981), p. 33.

[4] Advisory Commission on Intergovernmental Relations, *Intergovernmentalizing the Classroom: Federal Involvement in Elementary and Secondary Education*, A–81 (Washington, DC: U.S. Government Printing Office, 1981), pp. 61–62.

[5] Mel Dubnick and Alan Gitelson, "Intergovernmental Relations and Regulatory Policy," paper presented at a Symposium on Regulatory Policy, Houston, Texas, November 12–20, 1979, p. 30.

[6] For example, see John Brigham and Don W. Brown, eds., *Policy Implementation: Penalties or Incentives?* (Beverly Hills, CA: Sage Publications, 1980).

[7] See Alan Stone, *Regulation and Its Alternatives* (Washington, DC: Congressional Quarterly Press, 1982, p. 10, and Fred Thompson and L.R. Jones, *Regulatory Policy and Practices* (New York: Praeger Publishers, 1982), pp. 8–13.

[8] For an historical overview of program conditions, see Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A-52 (Washington, DC: U.S. Government Printing Office, 1978), chapter I.

[9] This definition of regulation is consistent with one suggested by the U.S. Domestic Council, which specifically excluded various forms of financial assistance. See U.S. Domestic Council, Review Group on Regulatory Reform, *The Challenge of Regulatory Reform* (Washington, DC: U.S. Government Printing Office, 1977), pp. 3–4.

[10] See also the discussion of the "continuum of compulsion" in Catherine H. Lovell *et al.*, *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), pp. 46–50.

[11] Gerald E. Frug, "The Judicial Power of the Purse," *University of Pennsylvania Law Review* 126 (April 1978), pp. 718–19.

[12] William Lilley, III and James C. Miller, III, "The New 'Social Regulation'," *The Public Interest* 47 (Spring 1977), pp. 49–61.

[13] Lettie McSpadden Wenner, *One Environment Under Law: A Public-Policy Dilemma* (Pacific Palisades, CA: Goodyear Publishing Company, 1976), p. 92.

[14] *National League of Cities v. Usery*, 426 U.S. 833 (1976).

[15] For a discussion of state practices, see Advisory Commission on Intergovernmental Relations, *State Mandating of Local Expenditures*, A–67 (Washington, DC: U.S. Government Printing Office, 1978).

[16] PL 88–352, title VI, section 601, July 2, 1964.

[17] See ACIR, A–52, chapter VII.

[18] Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Papers, Volume I* (Washington, DC: U.S. Government Printing Office, 1980).

[19] Lovel *et al.*, p. 35.

[20] See Roger A. Cunningham, "Billboard Control Under the *Highway Beautification Act of 1965*," *Michigan Law Review* 71 (June 1973), pp. 1295–374.

[21] James B. Croy, "Federal Supersession: The Road to Domination," *State Government* 48 (Winter 1975), p. 34. Emphasis added.

[22] Frank J. Thompson, *Health Policy and the Bureaucracy: Politics and Administration* (Cambridge, MA: The MIT Press, 1981), p. 240.

[23] Congressional Budget Office, *Federal Constraints on State and Local Government Actions* (Washington, DC: U.S. Government Printing Office, 1979), p. 7.

[24] Mel Dubnick and Alan Gitelson, "Nationalizing State Policies," in *The Nationalization of State Government*, Jerome J. Hanus, ed., (Lexington, MA: D.C. Heath and Company, 1981), pp. 56–57.

[25] "Fighting Federal Mandates," *New York Times*, August 16, 1980, p. 20.

[26] Edward I. Koch, "The Mandate Millstone," *The Public Interest* 61 (Fall 1980), p. 42.

[27] *Ibid.*

[28] Clint Page, "NLC Surveys Members on Federal Rules," *Nation's Cities Weekly*, April 6, 1981. p. 1.

[29] "Statement on Federalism Reform adopted by the Executive Committees of the National Conference of State Legislatures and the National Governors' Association," *State Legislatures*, February 1981, p. 7.

[30] Suzanne Garment, "Califano's Memoir: Washington Before the 1980 Flood," *The Wall Street Journal*, May 29, 1981, p. 24.

[31] Murray L. Weidenbaum, "Let States Decide How to Muffle Garbage Trucks," *Washington Star*, May 6, 1981, p. A14.

[32] Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in U.S. Congress, Joint Economic Committee, *Special Study on Economic Change, Volume 5, Government Regulation: Achieving Social and Economic Balance*, 96th Cong., 2d sess., December 8, 1980, p. 327.

[33] *Ibid.*, p. 335.

[34] See U.S. Environmental Protection Agency, *1980 Needs Survey: Cost Estimates for Construction of Publicly Owned Wastewater Treatment Facilities* (Washington, DC: U.S. Government Printing Office, 1981). Amend-

ments to the act in 1981 extended this deadline to 1988.

[35] Comptroller General of the United States, *Costly Wastewater Treatment Plants Fail to Perform As Expected* (Washington, DC: U.S. General Accounting Office, 1980).

[36] *Lau v. Nichols*, 414 U.S. 563 (1974).

[37] Rochelle L. Stanfield, "Are the Federal Bilingual Rules a Foot in the Schoolhouse Door?" *National Journal*, October 18, 1980, p. 1736.

[38] *Ibid*., p. 1739.

[39] "State-Based Groups Urge Congressional Hearings on Bilingual Education Rules," *Governor's Bulletin*, November 30, 1980.

[40] Timothy B. Clark, "Regulation Gone Amok: How Many Billions for Wheelchair Transit?", *Regulation*, March/April 1980, p. 49.

[41] Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches* (Washington, DC: U.S. Government Printing Office, 1979), p. xi.

[42] *Ibid*., p. xii.

[43] *Federal Register*, Vol. 46, No. 136, Monday, July 20, 1981, pp. 37488–94.

[44] *American Public Transit Association v. Lewis*, No. 80–1497, May 26, 1981.

[45] Office of Management and Budget, "Proposed Circular on Managing Generally Applicable Requirements for Assistance Programs," *Federal Register*, November 7, 1980, p. 74416.

[46] Advisory Commission on Intergovernmental Relations. *Hearings on the Federal Role*, Report A–87 (Washington, DC: U.S. Government Printing Office, 1980), p. 76.

[47] Richard B. Cappalli, "Mandates Attached to Federal Grants: Sweet and Sour Federalism," *The Urban Lawyer* 13 (Spring 1981), p. 152.

[48] *Ibid.*

[49] Thomas J. Madden, "The Law of Federal Grants," in Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M–122 (Washington, DC: U.S. Government Printing Office, 1980), p. 17.

[50] Lester B. Lave, *The Strategy of Social Regulation: Decision Frameworks for Policy* (Washington, DC: The Brookings Institution, 1981), p. 135.

[51] See Charles L. Schultze, *The Public Use of Private Interest* (Washington, DC: The Brookings Institution, 1977).

[52] Richard Zeckhauser and Albert Nichols, "The Occupational Safety and Health Administration—An Overview," in U.S. Congress, Senate, *Study on Federal Regulation: Appendix to Volume VI: Framework for Regulation*, 95th Cong., 2d sess., December 1978, p. 165. See also John Mendeloff, *Regulating Safety: An Economic and Political Analysis of Occupational Safety and Health Policy* (Cambridge, MA. MIT Press, 1980), and Lawrence S. Bacow, *Bargaining for Job Safety and Health* (Cambridge, MA: MIT Press, 1980).

[53] See Koch, "The Mandate Millstone," pp. 43-4.

[54] Joseph F. Zimmerman, "Frustrating National Policy: Partial Federal Preemption," in Hanus, ed., p. 98.

[55] Joanne Omang, "The Clean Air Act: Straightening Out a Regulatory Maze," *The Washington Post*, February 22, 1981, p. A28.

[56] *Ibid.*

Appendix Figure 1–A

Major Federal Statutes Regulating State and Local Governments

Title	Objective	Public Law	Type[1]
Age Discrimination Act of 1975	Prevent discrimination on the basis of age in federally assisted programs.	94–135	CC
Age Discrimination in Employment Act (1974)[2]	Prevent discrimination on the basis of age in state and local government employment.	93–259; 90–202	DO
Architectural Barriers Act of 1968	Make federally occupied and funded buildings, facilities and public conveyances accessible to the physically handicapped.	90–480	CC
Civil Rights Act of 1964 (Title VI)	Prevent discrimination on the basis of race, color or national origin in federally assisted programs.	88–352	CC
Civil Rights Act of 1968 (Title VIII)	Prevent discrimination on the basis of race, color, religion, sex or national origin in the sale or rental of federally assisted housing.	90–284	CC
Clean Air Act Amendments of 1970	Establish national air quality and emissions standards.	91–604	CC,CO,PP
Coastal Zone Management Act of 1972	Assure that federally assisted activities are consistent with federally approved state coastal zone management programs.	94–370	CC
Davis-Bacon Act (1931)[3]	Assure that locally prevailing wages are paid to construction workers employed under federal contracts and financial assistance programs.	74–403	CC
Education Amendments of 1972 (Title IX)	Prevent discrimination on the basis of sex in federally assisted education programs.	92–318	CC
Education for All Handicapped Children Act (1975)	Provide a free appropriate public education to all handicapped children.	94–142	CO[4]
Emergency Highway Energy Conservation Act (1974)[5]	Establish a national maximum speed limit of 55 mph.	93–239	CO
Endangered Species Act of 1973	Protect and conserve endangered and threatened animal species.	93–205	CC,PP

Title	Objective	Public Law	Type[1]
Equal Employment Opportunity Act of 1972	Prevent discrimination on the basis of race, color, religion, sex or national origin in state and local government employment.	92–261	DO
Fair Labor Standards Act Amendments of 1974	Extend federal minimum wage and overtime pay protections to state and local government employees.[6]	93–259	DO
Family Educational Rights and Privacy Act of 1974	Provide student and parental access to educational records while restricting access by others.	93–380	CC
Federal Insecticide, Fungicide,, and Rodenticide Act (1972)	Control the use of pesticides that may be harmful to the environment.	92–516	PP
Federal Water Pollution Control Act Amendments of 1972	Establish federal effluent limitations to control the discharge of pollutants.	92–500	CC,PP
Flood Disaster Protection Act of 1973	Expand coverage of the national flood insurance program.	93–234	CC,CO
Hatch Act (1940)	Prohibit public employees from engaging in certain political activities.	76–753	CC
Highway Beautification Act of 1965	Control and remove outdoor advertising signs along major highways.	89–285	CO
Marine Protection Research and Sanctuaries Act Amendments of 1977	Prohibit ocean dumping of municipal sludge.	95–153	DO
National Energy Conservation Policy Act (1978)	Establish residential energy conservation plans.	95–619	PP
National Environmental Policy Act of 1969	Assure consideration of the environmental impact of major federal actions.	91–190	CC
National Health Planning and Resources Development Act of 1974	Establish state and local health planning agencies and procedures.	93–64	CO
National Historic Preservation Act of 1966	Protect properties of historical, architectural, archeological and cultural significance.	89–665	CC
Natural Gas Policy Act of 1978	Implement federal pricing policies for the intrastate sales of natural gas in producing states.	95–621	PP
Occupational Safety and Health Act (1970)	Eliminate unsafe and unhealthful working conditions.	91–596	PP

Title	Objective	Public Law	Type[1]
Public Utilities Regulatory Policies Act of 1978	Require consideration of federal standards for the pricing of electricity and natural gas.	95–617	DO
Rehabilitation Act of 1973 (Section 504)	Prevent discrimination against otherwise qualified individuals on the basis of physical or mental handicap in federally assisted programs.	93–112	CC
Resource Conservation and Recovery Act of 1976	Establish standards for the control of hazardous wastes.	94–580	PP
Safe Drinking Water Act of 1974	Assure drinking water purity.	33–523	CC,PP,DO
Surface Mining Control and Reclamation Act of 1977	Establish federal standards for the control of surface mining.	95–87	PP
Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970	Set federal policies and reimbursement procedures for property acquisition under federally assisted programs.	91–646	CC
Water Quality Act (1965)	Establish federal water quality standards for interstate waters.	88–668	PP
Wholesome Meat Act (1967)	Establish systems for the inpection of meat sold in intrastate commerce.	90–201	PP
Wholesome Poultry Products Act of 1968	Establish systems for the inspection of poultry sold in intrastate commerce.	90–492	PP

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[1] Key: crosscutting requirement (CC), crossover sanction (C0), direct order (D0), partial preemption (PP).

[2] Coverage of the act, originally adopted in 1967, was extended to state and local government employees in 1974.

[3] Although the *Davis-Bacon Act* applied initially only to direct federal construction, it has since been extended to some 77 federal assistance programs.

[4] Although participation is voluntary, the failure of a participating state to comply with federal requirements can result in the withholding of funds from several federal handicapped education programs. The requirements of PL 94–142 are nearly identical to those established by the Department of Education under Section 504 of the *Rehabilitation Act*, a crosscutting requirement.

[5] A permanent national 55 mph speed limit was established by the *Federal-Aid Highway Amendments of 1974*, (PL 93–643), signed into law January 4, 1975.

[6] Application was restricted by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Appendix Figure 1–B

National Inventory of Crosscutting Requirements

SOCIO-ECONOMIC POLICY REQUIREMENTS (36)

A. Nondiscrimination (9)

1. *Civil Rights Act of 1964*, Title VI (race, color or national origin) (42 U.S.C. 2000d *et seq.*).
2. *Age Discrimination Act of 1975* (42 U.S.C. 6101).
3. Title IX of the *Education Act Amendments of 1972*, as amended by PL 93–568, 88 Stat. 1855 (20 U.S.C. 1681 *et seq.*).

Housing

4. Title VIII of the *Civil Rights Act of 1968*, PL 90–284, 82 Stat. 73 (18 U.S.C. 245).

Handicapped

5. Sec. 504 of the *Rehabilitation Act of 1973*, PL 93–112, and *Rehabilitation Act Amendments of 1974*,, PL 93–516.
6. *Architectural Barriers Act of 1968*, as amended, PL 90–480 (42 U.S.C. 4151 *et seq.*).

Alcoholics

7. *Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970*, PL 91–616 (42 U.S.C. 4581).

Drug Abusers

8. *Drug Abuse Office and Treatment Act of 1972*, PL 92–225, as amended (21 U.S.C. 1174).

Construction Activities

9. E.O. 11246, September 24, 1965, Part III (race, color, creed or national origin).

B. Environmental Protection (16)

10. *National Environmental Policy Act of 1969*, as amended, PL 91–190 (42 U.S.C. 4321 *et seq.*).
11. Sec. 508 of the *Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act)*, PL 95–500 (33 U.S.C. 1251 *et seq.*).
12. Title XIV, *Public Health Service Act*, as amended by Sec. 1424 (e) of the *Safe Drinking Water Act of 1974*, PL 93–523 (42 U.S.C. 300f to J10).
13. Conformity of Federal Activities with State Implementation Plans under the *Clean Air Act Amendments of 1977*, Title I, Sec. 129(b).
14. Sec. 306 of *Clean Air Act*, as added by the *Clean Air Amendments of 1970*. PL 91–604, 84 Stat. 1707.
15. *Endangered Species Act of 1973*, PL 93–205 (16 U.S.C. 1531 *et seq.*), as amended by PL 95-632.
16. Floodplain Management. E.O. 11988, May 24, 1977.
17. Protection of Wetlands, E.O. 11990, May 24, 1977.
18. *National Flood Insurance Act of 1968*, as amended by *Flood Disaster Protection Act of 1973*, PL 93–234, Sec. 102 and 202.
19. *Fish and Wildlife Coordination Act of 1934* (16 U.S.C. 661 *et seq.*).

20. Sec. 106 of the *National Historical Preservation Act of 1966*, PL 89–665, as amended (16 U.S.C. 470), 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978).
21. Procedures for the Protection of Historic and Cultural Properties (36 CFR 800).
22. Protection and Enhancement of the Cultural Environment, E.O. 11593, May 31, 1971, (36 FR 8921, 16 U.S.C. 470).
23. *Wild and Scenic Rivers Act of 1968*, PL 90–542, as amended (16 U.S.C. 1271 *et seq.*).
24. Secs, 307(c) and (d) of the *Coastal Zone Management Act* of 1972, as amended (16 U..S.C. 1451 *et seq.*).

Construction Activities (Grantee Contracts)

25. *Archaeological and Historic Preseration Act*, May 24, 1974, PL 93–291 (16 U.S.C. 469a–469a–2).

C. Protection and Advancement of Economy (3)

26. *Cargo Preference Act*, PL 664, 68 Stat. 832.
27. *Use of U.S. Flag Air Carriers, International Air Transportation Fair Competitive Practices The Act of 1974*, PL 93–623 (49 U.S.C. 1517).
28. Placement of Procurement and Facilities in Labor Surplus Areas, 32 A CFR Part 134.

D. Health, Welfare and Safety (3)

29. Protection of Human Subjects of Biomedical and Behavioral Research, Sec. 474, *National Research Act*, PL 93–348 (42 U.S.C. 289–3) as implemented by 45 CFR 46.
30. Lead-Based Paint Poisoning Prohibition (42 U.S.C. 4831(b)).
31. *Animal Welfare Act of 1966* (7 U.S.C. 2131–2147).

E. Minority Participation (2)

32. Indian Self-Determination and Education Assistance, Sec. 7(g), PL 93–638, January 4, 1975, *25 U.S.C. 450e(b).
33. Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating, and Implementing a National Program for Women's Business Enterprise, E.O. 12138, May 18, 1979.

F. Labor Standards (3)

Grantee Contracts Only

34. *Davis-Bacon Act*, 40 U.S.C. 276a—276a–7 and 27 CFR Pt. 1, 46 Stat. 1494, Appendix A.
35. *Anti-Kickback (Copeland) Act* (18 U.S.C. 874; 40 U.S.C. 276c).
36. *Contract Work Hours and Safety Standards Act* (40 U.S.C. 327–332).

ADMINISTRATIVE AND FISCAL POLICY REQUIREMENTS (23)

A. Public Employee Standards (2)

37. *Intergovernmental Personnel Act of 1970*, as added by Title VI, Sec. 602, *Civil Service Reform Act*, PL 95–454 (42 U.S.C. 4728–4763).
38. *The Hatch Act* (5 U.S.C. 1501–1508).

B. Administrative and Procedural Requirements (General) (10)

39. *Federal Grant and Cooperative Agreement Act of 1977*, PL 95–224 (41 U.S.C. 501–509).
40. OMB Circular No. A–40, Management of Federal Reporting Requirements.
41. OMB Circular No. A–95, Evaluation, Review, and Coordination of Federal and Federally Assisted Programs and Projects, Revised, January 13, 1976.
42. OMB Circular No. A–111, Jointly Funded Assistance to State and Local Governments and Nonprofit Organizations—Policies and Procedures, July 6, 1976.
43. E.O. 12044, March 23, 1978, Improving Government Regulations.
44. Department of Commerce Directives for the Conduct of Federal Statistical Activities, May, 1978 (Formerly OMB Circular No. A–46).
45. FMC 74–8, Guidelines for Agency Implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies of 1970 Public Law 91–646, October 4, 1976.
46. Treasury Circular No. 1082, Notification to States of Grant-in-Aid Information, August 8, 1973.
47. Treasury Circular No. 1075 (Fourth Revision), Regulation Governing the Withdrawal of Cash from Treasury for Advance Payments under Federal Grant and Other Programs, December 14, 1947.
48. *Claims Collection Act of 1966*, PL 89–508, 89 Stat. 309 (31 U.S.C. 952).

C. Recipient-Related Administrative and Fiscal Requirements (9)

Nonprofit Organizations and Institutions

49. OMB Circular No. A–21 (Formerly FMC 73–8, December 19, 1973), Cost Principles for Educational Institutions, March 6, 1979.
50. OMB Circular No. A–⅛110, Grants and Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organization-Uniform Administrative Requirements, July 30, 1976.
51. FMC 73–3, Cost Sharing on Federal Research, December 4, 1973.
52. OMB Circular No. A–88 (Formerly FMC 73–6), Coordinating Indirect Cost Rates and Audit at Educational Institutions, December 19, 1973. Revised A–88 (formerly FMC 73) to be published in July, 1979.
53. FMC 73–7, Administration of College and University Research Grants, December 19, 1973.

State and/Or Local Governments

54. OMB Circular No. A–90, Cooperating with State and Local Governments to Coordinate and Improve Information Systems, September 21, 1968.
55. OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments, Revised, August 24, 1977.
56. OMB Circular No. A–73 (Formerly FMC 73–2 September 27, 1973), Audit of Federal Operations and Programs, March 15, 1978.
57. FMC 74–4, Cost Principles Applicable to Grants and Contracts with State and Local Governments, July 18, 1974.

D. Access to Information (2)

58. *Freedom of Information Act* (5 U.S.C. 552).
59. *Privacy Act of 1974*, PL 93–579 (5 U.S.C. 522a).

SOURCE: Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Papers, Volume I* (Washington, DC: U.S. Government Printing Office, 1980), pp. A–8–1 to A–8–6.

Chapter 2

The Legal Foundations of Regulatory Federalism: Constitutional and Judicial Perspectives

> *This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land. . . .*[1]

So, in part, reads Article VI of the *United States Constitution*, the "implementing" section of the nation's paramount legal document. "[T]he source of much virulent invective and petulant declamation"[2] at its "birth" nearly two centuries ago, the supremacy clause and the more expansive, as well as inferential, federal powers which flow from it have remained sources of some discontent—discontent spawned by the fact that it is through such powers that the national government, either directly or circuitously, may regulate state policy and/or preempt state activity.

Being a relatively brief and open-ended document, the Constitution is the subject of ongoing interpretation and reinterpretation. And, despite the obvious brilliance and considerable difficulty which went into drafting the original document, that task may, in fact, have been the easiest task involved in the development of Constitutional law. Hence, any powers which the federal government wields today are powers which have been defined over a period of 193 years—powers which will, no doubt, continue to be redefined for as long as the Republic survives.

The supremacy clause, while expansive on its face, does not authorize the federal government to do whatever it pleases. The laws of the United States are supreme only as long as they conform to other provisions of the Constitution. Therefore, if the federal government is to impose rules and prohibitions on the states, it must find justification in other portions of the Constitution. Such legal justifications may run the gamut from those which are fairly explicit, to those which are plausibly implicit, to those which, some would contend, require rather tremendous leaps of faith. Moreover, the various justifications need not be mutually exclusive, as more than one Congress—in Constitutionally hedging its bets—has been quite mindful. Thus, the federal power to regulate the states is as complex as it always has been controversial.

Because of this inherent complexity, there is no simple method of perfectly dividing, for the purposes of explanation, either the Constitutional powers of the federal government (and the states) or the historical time frames in which those powers have been delineated and refined. Nonetheless, this section, by way of background, will attempt to analyze those provisions of the Constitution which form the major bases for, and prohibitions against federal regulation and briefly trace their development through the New Deal. While such a mammoth chunk of time (covering the Civil War, the Great Depression, and the addition of 35 states to the Union) constitutes an admittedly contrived historical "era," it is employed here because it was a period which witnessed the legal evolution of federal regulatory powers over primarily *economic* matters and the creation, as a result, of a line of legal precedent which has acted as a strong basis for modern intergovernmental regulation. Succeeding sections will examine the legal developments and changing judicial attitudes which have, over the past 25 years, fostered a virtual explosion in the number, type and extent of federal mandates.

INTERGOVERNMENTAL REGULATION AND THE LAW: CONSTITUTIONAL FOUNDATIONS AND EARLY APPLICATIONS

The Explicit Constitution: "Direct" Sources of Regulation and Preemption

THE COMMERCE POWER

The source of intergovernmental regulation and national prerogative lies in the powers of Congress. Most of the more expansive powers of Congress, both explicit and implicit, are set forth in Article I, Section 8 of the Constitution. And, of those powers, the most *direct* source of potential Constitutional restraint upon state governments (the 14th Amendment being the notable exception) is found in the commerce clause—in particular, the Congressional charge to "regulate commerce ... among the several states."

As much as, if not more than, any other federal power, the grant of Congressional power to regulate commerce was a reasoned and reasonable reaction to the nation's near disastrous experience under the Articles of Confederation, for allowing the individual states such power had resulted in commercial anarchy. Thus, while the founders were less than collectively sanguine about much of the proposed Constitution,[3] the commerce clause, according to James Madison, "seems to be an addition which few oppose and from which no apprehensions are entertained."[4] Both opposition and apprehension, however, were quickly forthcoming.

Hence, while there was immediate and fairly universal agreement over *who* should regulate commerce, the Constitutional ink had barely dried when *what, how,* and *where* came into contention. The "answers," proffered by Chief Justice John Marshall 158 years ago, remain central to the definition of commerce—this, despite more than a few attempts to limit its scope.

Marshall, first, spoke to the "what" and, here, his answer suggested a near all-inclusiveness, for he summarily dismissed the notion that commerce was merely a synonym for traffic. Rather, he contended that:

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse....[5]

At a time when Congressional activity in "regulating" commerce was limited to policing foreign vessels and licensing some coastal traders,[6] Marshall's definition held little meaning beyond its immediate impact in destroying a steamboat monopoly. Yet, his inclusive terminology had given Congress the power to control the practices of virtually every sort of commercial activity—a power not lost on modern Congresses.

Second, Marshall addressed the meaning of "among the states:"

> The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary lines of each state, but may be introduced into the interior....[7]

Again, at the time, this portion of the opinion had only limited meaning. Yet, the statement implies a thin, if not nearly invisible, line between interstate and intrastate commerce, the imperceptibility of which has been used in modernity for every manner of national regulation.[8] Finally,[9] the Chief Justice attempted to speak to the question of concurrent federal-state regulatory powers. On this point, however, he was somewhat vague, calling the federal commerce power "complete" but failing to say "whether the states had any actual concurrent power over interstate commerce in the absence of federal regulation."[10]

Twenty-seven years following the Marshall Court's commerce decision, the Supreme Court, than presided over by Roger Taney, expanded on the issue of concurrent powers by calling upon a doctrine of "selective exclusiveness." Using that doctrine, Taney conceded that the states were not "expressly exclude[d] ... from exercising an authority over [commerce.]"[11] Rather, the Court held that the power to regulate commerce was only exclusive to Congress if Congress chose to exercise it. In the Court's words, "the nature of [the commerce power] is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states...."[12]

In practice, the federal government did little to actively regulate the nation's commercial activity until the 20th century and what little it did was primarily in the narrow area of traffic. Moreover, even these limited endeavors were quickly gutted by justices who favored unrestrained capital expansion.[13] Instead, the federal commerce power was used *restrictively* by the courts to curb state power (thereby, making something of a legal fiction of the Taney doctrine), rather than to promote any federal activity.[14] In fact, prior to 1900 nearly all of the 1,400 commerce cases to have reached the Supreme Court were examinations of state laws and practices.[15]

The turn-of-the-century saw the beginning of a "New Nationalism", the policy brainchild of President Theodore Roosevelt. It also witnessed, through Roosevelt's inventive use of the commerce clause, the creation of a theretofore unheard of federal police power. Through that power, the President and Congress, with the acquiescence of the Surpeme Court, moved aggressively into areas traditionally policed by the states and through them local governments. These areas involved merchandise, people and practices which crossed state boundaries. Thus, the federal government, backed by the Court, attacked gambling,[16] tainted food and drugs,[17] prostitution[18] and an array of additional practices and items deemed socially, medically or economically harmful to the public.[19]

Moreover, the Court looked favorably on Roosevelt's enthusiastic trust-busting activities, [20] as well as on his efforts to revitalize the crippled Interstate Commerce Commission.[21] Such endeavors were sustained and enlarged throughout the equally vigorous Wilson years.[22]

The quantum regulatory leap which the federal government had made during the first two decades of this century was not, however, without its detractors. In fact, so expansive was that leap[23] that an equally "expansive" reaction was probably inevitable. And, when the reaction occurred, it occurred with gusto—in the Presidency, the Congress, and perhaps most visibly and certainly for the most protracted period of time in the Supreme Court. Thus, alleging improper use of the commerce power, the Court struck down a child labor law,[24] chipped away at provisions of the *Clayton Anti-Trust Act,*[25] and, of course, in some of its most famous commerce-related decisions, completely undermined the first New Deal.[26]

No doubt, the most profound turning point in the long history of the federal interstate commerce power occurred during the second New Deal of Franklin Roosevelt—profound not only because it resulted in the prodigious expansion of the federal government's regulatory control over the economy but also because the period's broad legal interpretations of the commerce power, with few exceptions, have persisted to this day.

If Supreme Court rulings respond to public opinion, that response during the initial disruptions of the Great Depression was dilatory to say the least, causing an angry and frustrated President to resort to an extreme and ultimately unsuccessful court-packing plan. While it has never been clear whether Roosevelt's threat caused the Court to change, change it did and in the extreme. And, the most extensive changes occurred in the realm of commerce.

Thus, in a series of decisions handed down between 1937 and 1942, the Supreme Court sanctioned an almost unlimited Congressional power to regulate interstate commerce.

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or approriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise the control.[27]
>
> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce....[28]
>
> ..[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." ...[29]

By 1942, the Court had decided that there were few private sector activities which the federal government could not in some way touch through its power to regulate interstate commerce. Morever, if a state activity conflicted with, or was contrary to a federal endeavor, the state action could be superseded. Of equal importance, in the wake of this new "no holds barred' judicial attitude, however, would be the use, in succeeding years, of a kind of "partial preemption"—a way for the federal government, practically speaking, to mandate certain state activities in the absence of any explicit Constitutional authority to do so.[30]

THE 14TH AMENDMENT

Through the commerce power, Congress may *directly* regulate private industry and *directly* preempt state authority. It is, then vis-a-vis the states, a *directly* negative power. The commerce power, as will become clear in succeeding sections, may only be used to require certain positive state actions in a rather circuitous, if ultimately quite effective, manner. In fact, the founders, being representatives of individual states, were understandably quite assiduous in avoiding language which might be interpreted as giving the federal government a right to force an undesired activity upon a state. While the Constitution conferred on the federal government a number of positive powers subsequently denied to the states, and even absolutely barred the states from performing certain other functions, it nowhere offered to Congress any specific power by which it could require the states to *do* anything. And, even when that power was granted 79 years later, it was stated in negative terms and used in a primarily negative manner for approximately eight more decades.

Nonetheless, the great 14th Amendment, the post-Civil War declaration of national supremacy, was not without substantial importance even in its "negative" stage, for the concepts developed during that period literally revolutionized Constitutional law and became the basis for the so-called judicial activism of the 1950s, 1960s, and 1970s.

Thus, although the amendment's potential as an instrument for mandating positive state actions was not fully realized until well into this century, much of its conceptual promise was rather quickly gleaned.

Based on the *Civil Rights Act of 1866*, Section 1 of the 14th Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[31]

On its face, the obvious purposes of the 14th Amendment were to confer citizenship on the recently freed black population and to establish a national citizenry invested with all the rights and privileges of the United States Constitution. Yet, these "obvious" objectives were really accomplished in name only until well into the 20th century.

Hence, the black person may indeed have been granted citizenship and equal protection of the laws, but "equal" soon came to mean separate[32] and citizenship was attended by the "privilege" of being treated unfairly and "immunity" from a decent standard of living. Moreover, the Supreme Court did not even hint at the fact that such an interpretation might somehow be faulty until as late as 1938[33]—and, then, only in very specific instances.

Nor did the idea of national citizenship fare much better. In fact, a mere five years after the amendment's ratification, the privileges and immunities clause had, in effect, been judicially repealed,[34] foreclosing large scale application of the Bill of Rights to the states, except in selected (usually First Amendment) areas,[35] until the 1960s.[36]

All of this is not to say, however, that the 14th Amendment lay dormant until recently. Quite the contrary, it has been employed frequently and ingeniously throughout its Constitutional lifetime. And, some of the concepts developed during the late 19th and early 20th centuries—though used for entirely different purposes—are crucial to an understanding of the amendment's function today.

Substantive Due Process

Due process, of course, is one of the oldest and most venerable concepts in Anglo-American law—dating back at least to the 13th century signing of the Magna Carta. Yet, its traditional function had been to serve as a procedural safeguard. That is, due process of law had always been interpreted to mean that a law or justice must be equitably (and Constitutionally) created and applied. And, even this would be a somewhat broad description, for in practice due process was almost exclusively applied to the administration of criminal justice. Beginning in the late 19th century,[37] however, due process was extended and Constitutional law, as a result, was revolutionized.

In 1890, the Supreme Court first found a state law unconstitutional on substantive due process grounds.[38] In that instance it ruled that a law, equitably applied, and enacted by a duly elected and procedurally proper state legislature violated the 14th Amendment by depriving the railroads of "property" without due process of law. This new, and obviously radical, interpretation of the concept transformed it from a process-related safeguard to "a guarantee against unreasonable legislative interference with private property."[39]

Equal Protection

Though, as noted earlier, equal protection was selectively applied until the mid-20th century, it too signalled a revolutionary change in

Constitutional law from its inception. Hence, while the principle of due process—if in another form—was over 600 years old and had always been applied to the federal government through the Fifth Amendment, the equal protection clause—a guarantee that "any classification of 'persons' shall be reasonably related to the purpose of good government"[40]—is found nowhere except in the 14th Amendment. Of course, the authors' original intent to protect the rights of blacks[41] fell quickly by the wayside, but throughout the amendment's early life the concept experienced some development through its application to other "persons" as defined by the courts.

"All Persons"

A final early contribution of the 14th Amendment was the extension of the status of "persons" to corporations.[42] While the fact is not of immediate significance for the purposes of this chapter, it is important when viewed in the larger context of extending personality to entities which are not necessarily individual human beings. And, as will be discussed in a subsequent section, that status would be extended, in the 1960s, to municipalities—not as a protection but as a liability.

THE VOTING AMENDMENTS

As originally drafted, the Constitution sought to provide the states with some amount of structural influence over national policymaking.[43] Thus, Senators were to be chosen by the state legislatures[44] and the qualifications of voters for Congressional elections were to be determined by the states. Beginning in 1870, of course, state power over the composition of the electorate was severely curtailed, at least in theory, by means of the 15th Amendment, which prohibited discrimination in the voting booth on the basis of "race, color, or previous condition of servitude." The same prohibition was applied to discrimination on the basis of sex in 1920 through the 19th Amendment and 44 years later, the 24th Amendment banned the use of poll taxes as a means of weeding out "undesirable" electors. Finally, in 1971, the Constitution was amended for the 26th time to prohibit discrimination against voters 18 years and older on the basis of age. The combined effect of these amendments (particularly the 15th as implemented through the *Voting Rights Acts*) and Supreme Court redistricting decisions in the 1960s would be to give the federal government a great deal of regulatory latitude over important areas of state procedure and effect a corresponding weakening of the states' structural influence over national policymaking.

The Implicit Constitution: Indirect Sources of Regulation

TAXING, SPENDING AND THE GENERAL WELFARE

In a sense, as the previous pages have shown, even the explicitly regulatory provisions of the Constitution, such as the commerce clause, have been repositories of implicit federal powers which the founders could hardly have imagined. Nonetheless, all of the above mentioned Constitutional provisions were seen, from their origins, as explicitly regulatory in one way or another. The same was not so explicit for the Congressional charge to "lay and collect taxes ... and provide for the ... general welfare."[45] On its face, the act of raising and subsequently spending money does not appear regulatory at all. Yet, both components of the clause have been used frequently in that regard.

Thus, the Courts have long acknowledged that "[e]very tax is in some measure regulatory."[46] What makes the use of taxation-as-regulation implicit, however, is its incidental nature. That is, in enacting a tax, Congress must indulge in the pretense that raising revenue is its major purpose—even where that quite obviously is not the case.[47]

Like the commerce power, the use of the taxing power as a regulatory device has worked most frequently to preempt state activity. However, clever manipulation of tax policy has also been used to "induce" state performance of certain functions. In fact, the now familiar inducement versus coercion standard "first evolved in cases challenging conditions attached to credits against federal taxes awarded to encourage state development of a particular program."[48]

Thus, for example, the unemployment insurance component of the *Social Security Act* uses the tax credit device for employers contributing to state unemployment funds. When the act was challenged in 1937 as coercing states to pass legislation and as an invasion of state powers, the Court held that "the excise is not void as involving coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."[49] Rather, the justices likened the act to a "temptation,"[50] from which states were free to refrain.

Of course, legality and philosophy aside, no state could practically have refused to participate since its business employers would not then have received the credit. "The tax-credit was thus an expedient way of avoiding Constitutional objections to a direct compulsion of state action under the commerce power."[51]

A far more common vehicle for "tempting" states to undertake (or refrain from) some activity has been the so-called spending power. Hence, Congress has long been in the business of providing financial assistance to the states, conditioned on some desired state response. In turn, these conditions need only be *"reasonably related to a legitimate national purpose"* and provide the states with "an option to fail to respond, so that the program may be said to *induce but not coerce* participation."[52] The courts have employed this two-pronged test since 1923.

In the case of *Massachusetts v. Mellon*,[53] the Supreme Court dismissed a challenge to a grant-in-aid program by noting that:

> Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. . . . If Congress enacted [the program] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.[54]

Moreover, in the case of *U.S. v. Butler*,[55] the Court—though striking down the *Agricultural Adjustment Act*—nonetheless sanctioned the use of the Congressional spending power to achieve ends not necessarily included in the enumerated powers. Later, in *Oklahoma v. Civil Service Commission*,[56] the Court declared that, supplementing its power to spend for the general welfare, Congress possesses the "power to fix the terms upon which its money allotments to the states shall be disbursed."[57]

From the beginning, then, the Court has defined state receipt of federal expenditures as a contractual arrangement—albeit, a somewhat special contractual arrangement.[58] States (and localities) are admonished to abide by all the terms of the contract if they wish to continue receiving the benefits—even if those terms, under different circumstances, would clearly be unconstitutional. Thus, it would be patently unconstitutional for Congress to *directly* regulate the political activities of state employees, but it may do so *indirectly* and with full Constitutional blessing by making such regulation a *condition* of federal aid.[59]

Finally, what is the "general welfare"—that amorphous recipient of Congressional taxing and spending? It is, according to a 1937 Supreme Court decision, what Congress says it is.[60]

WHAT IS NECESSARY AND PROPER?

Probably no Constitutional phrase elicited more or greater opposition than the Article I, Section 8 instruction to Congress, "To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Critics, not surprisingly, claimed that the vagueness of the clause was inherently dangerous—that necessary and proper could be defined to encompass any conceivable legislative action. Moreover, in addressing the criticism, neither Madison nor Hamilton (who, in their post-Publius years, were to disagree more than agree), would allow themselves to be pinned down to specifics.[61]

Nor did Chief Justice Marshall, in one of his most far-reaching opinions, actually define the phrase. Rather, he viewed necessary and proper as investing Congress with unspecified "means"—or implied powers—for carrying out its Constitutional "ends":

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional. . . .[62]

By the 1940s, through the course of 150 years of Constitutional development, the federal government had come to possess—if not actually employ—a vast reservoir of powerful tools for achieving national purposes. It could regulate intrastate matters if those matters affected interstate commerce—even remotely. It could, if it so chose, protect the rights of state citizens against state laws and practices. It could regulate, again if it chose, many state electoral practices. It could attach conditions to receipt of its money which, in turn, could prohibit or force certain state actions. It could achieve any legitimate Constitutional end through any means not specifically prohibited. And, overarching all of this, its laws were to be considered supreme. Of course, the states, too, had powers. And, it is to these "reserved" and protective powers which we shall turn next.

The Constitution and the States

Being a document of nationhood, the Constitution does not dwell upon the states. Rather, it is primarily a series of responsibilities and prohibitions addressed to the national government and its officers. Of course, the states do figure in—positively, in their control (now greatly diminished) over the composition of the electorate and elections generally and negatively in a number of admonitions specifically prohibiting them from engaging in some of the Article I, Section 8 powers of Congress.[63] For the most part, however, the Founders assumed that state governments—being closer to the people and being the source, either directly or through the people,[64] of the Constitution itself—would *do* most of the governing.

That this Constitutional "assumption" was not universally shared is seen in the amount of space which Madison and Hamilton devoted in the *Federalist Papers* to reassuring doubters of the continued strength—indeed, the superiority—of the states under the proposed Constitution.[65]

More important, many of the states themselves insisted, as a bargaining point for ratification, on the subsequent enactment of amendments establishing a Bill of Rights, to be modeled on similar rights found in their own constitutions.[66] And, among these ten amendments is one addressed to the powers retained by the states.

Thus, the Tenth Amendment to the Constitution asserts that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.[67]

Whatever those reserved powers may (or may not) include today, they were vast indeed in the late 18th and early 19th centuries when major national concerns consisted primarily of defense, foreign policy and territorial governments. Under the Tenth Amendment, then, according to Professor Lewis B. Kaden:

> . . .[T]he states were left with much of the responsibility commonly associated with government. The states, and the substate government in cities or counties they created and controlled, determined which services to provide their inhabitants, and the form, level and means of providing them. Public safety, education, welfare, economic development, control of private business activity, protection of natural resources—the definition of collective or social goods, and the allocation of fiscal and administrative responsibility for their provision, both between public administration within the state—were all matters of state determination. The states, accordingly, used their governmental powers to tax, spend, and regulate to implement the basic decisions made in these matters.[68]

As might be expected, the powers subsumed under the Tenth Amendment ebbed and flowed in the opposite direction to those of the federal government. For example, where a proponent of federal regulation might argue an expansive interpretation of the commerce clause, an opponent would be likely to argue for equally expansive reading of the Tenth Amendment. Thus, the Supreme Court in 1935 struck down the *National Recovery Act*, the centerpiece of the First New Deal, as an "extra Constitutional authority ... precluded by the explicit terms of the Tenth Amendment."[69] Yet, a mere six years later, it had reduced the same amendment to little more than a Constitutional adage:

> Our conclusion is unaffected by the Tenth Amendment.... the amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers....[70]

Whether or not the drafters and adopters of the Tenth Amendment were engaging in sophistry on the one hand or tautology on the other, as the Court implied, the amendment appeared, by 1941, to have been relegated to a place of Constitutional insignificance.

Like the Tenth Amendment, the 11th Amendment to the Constitution was designed to protect the sovereignty retained by the states. Hence, the amendment was born of state dissatisfaction with the authority of the federal judiciary, coming to a head when, in 1793, the Supreme Court allowed two citizens of South Carolina to sue the state of Georgia.[71]

Ratified in 1798 the amendment states that

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.[72]

Unlike the Tenth Amendment, the 11th Amendment is more specific and therefore has at least stood on its face value. However, a series of court cases undermined its actual efficacy. Thus, in 1908, in *ex parte Young*,[73] the Supreme Court ruled that when a state official acts unconstitutionally, he or she is stripped of official capacity for the purposes of an 11th Amendment defense. According to A.E. Dick Howard:

> The result of the *Young* fiction is a paradox: an unconstitutional act by a state official is "state action" for the purposes of the 14th Amendment (the official may even be acting against state policy or violating state law), but an injunction against him is not an injunction against the state for the purposes of the 11th Amendment. As a state can only act through flesh-and-blood individuals, *Young* effectively permits equitable relief....[74]

Despite the *Young* fiction and the now-established Congressional power under Section 5 of the 14th Amendment to provide for suits against states or state officials which would be of questionable Constitutionality under other circumstances,[75] several Supreme Court cases of the 1970s have strengthened somewhat the states' 11th Amendment immunity.[76]

A final explicit source of state control has been the 21st Amendment to the Constitution which repealed the prohibition on liquor and, as a result, made "local, not national, regulation of the liquor traffic ... the general Constitutional policy."[77] According to Professor Laurence Tribe:

> ...[T]he 21st Amendment does grant states considerable power to control the importation of alcholic beverages. The amendment sanctions state action which taxes, regulates, or completely bars the importation of liquor for actual use within the state itself, even where such action would be forbidden [under the commerce clause] as to any other commodity.[78]

* * * * * * *

Overall, in a Constitutional sense, the states had clearly lost ground to the national government by the end of the New Deal. Yet, in many ways, the loss was more theoretical than real. Congress had, after all, retained a considerable amount of power over the nation's commercial activity since the time of John Marshall—it merely had chosen not to utilize that power to any great extent. Moreover, though Court opinion, by 1941, had trivialized the states' countervailing power, embodied in the Tenth Amendment, that too was more abstract than substantive. States still controlled most of their original functions—education, the environment, public safety and—of no minor significance—their own budgets:

> The functional assignment picture changed greatly [from the mid-1930s to 1960.] The national regulatory role expanded, though not to the extent of really undercutting the states' policy powers in a range of critical social and economic areas. Federal reliance on grants-in-aid as a means of achieving a range of specific programmatic ... purposes became much heavier during these years.... Yet this did not reach the point of affecting even a majority of most state functions or even any of most cities', counties', or school districts' basic services directly.[79]

Nonetheless, this theoretical loss of state power could be translated into a corresponding rise in federal regulatory power, for Constitutional "theory" expounded by the Supreme Court is, whether acted upon or not, the "supreme law of the land."

THE CONSTITUTIONAL ACCOMMODATION OF INTERGOVERNMENTAL REGULATION: CONTEMPORARY JUDICIAL CONSTRUCTION OF THE COMMERCE AND SPENDING POWERS

The legislation of the New Deal and subsequent Court rulings upholding it produced what has been called a "Constitutional Revolution"—so expansive was the resulting breadth of what the federal government could do. What it could do and what it actually did, however, were, in the immediate aftermath, two different things. Thus, although that legislation gave the federal government enormous control over the national economy, the states maintained control over most of their traditional functions. There were then and still are, after all, areas of state prerogative which the federal government cannot touch *directly*.

In addition to, and enhancing the Constitutional Revolution, was a slightly more subtle revolution in public opinion—a feeling, following the Great Depression, that the national government could and should perform certain functions for the public good. And, if it could not perform those functions *directly*, Constitutional means to perform them *indirectly* were readily available, if not immediately apparent.

Finally, and profoundly affecting the two previous revolutions was a revolution in the attitude of the Court. Thus, on the one hand, the Supreme Court—and, as a result, the lower federal courts—became, what some have termed, social activists. Yet, of equal, though less frequently noted, importance, was a corresponding passive judicial side—a side willing to acquiesce to nearly every act of an activist Congress. It is to the passive side which we shall turn in this section.

Regulating Through the Commerce Clause

PARTIAL PREEMPTION

Laurence Tribe has described "judicial restraint [as] but another form of judicial activism."[80] The growth of intergovernmental regulation over the past 20 years, unimpeded for the most part by any Court rejection of novel Congressional mechanisms, attests to that description. Thus, the previous chapter has identified a number of relatively new techniques by which the federal government has been able to impose regulations on state and local governments throughout the 1960s and 1970s. Among these, one of the most powerful has been partial preemption, in which administrative responsibility is delegated to the states or localities provided they meet certain nationally determined standards.[81]

For all practical purposes, this sort of backdoor commandeering is quite different from full federal preemption, for—again in practice—it borders on *mandating* state activity as opposed to *disallowing* state activity. Yet, for Constitutional purposes, the courts have tended to view these partial Congressional preemptions in a "commerce power-as-usual" light—this, despite a number of Tenth Amendment challenges.

Hence, current Court doctrine holds that any Tenth Amendment challenge to federal legislation "must satisfy *each* of three requirements:"

> First, there must be a showing that the challenged statute regulates the "states as states." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."[82]

Moreover, the Court has gone on to assert that:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to Congressional commerce power will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.[83]

Because each of the three requirements is somewhat vague, or at least "pliable," and because all must be met in order to dispute a federal law, successful challenges have been rare and limited to direct orders. Though regulatory in nature and based upon the commerce clause, partial preemptions are imbued with certain legal "twists" which distinguish them from direct orders. While *National League of Cities v. Usery*[84] posited some guidelines, the facts in that case—an instance of Congressional direct order—and thus the judgment, are not really similar to those in most partial preemptions cases. For instance, with partial preemptions such as the *Clean Air Act* it is exceedingly difficult to make the case that regulations affect the "states as states." Rather, they legally affect private parties *through* the states:

> If a state does not wish to submit a proposed permanent program that complies with the act and implementing regulations, the full regulatory burden will be borne by the federal government. Thus, there can be no suggestion that the act commandeers the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program.[85]

In cases of partial preemption, the courts have relied on Congressional findings that certain problems have substantial impacts on interstate commerce and therefore are legitimate Congressional concerns.[86] Of course, the courts have been acquiescing to Congressional regulation of commerce for nearly half a century. However, the more unique aspect of partial preemption—the state role—has also been given the judicial blessing. Hence, quite apart from negative Tenth Amendment usurpation issues discussed previously, the courts have actually treated partial preemptions positively—even to the point of viewing them as instances of federal deference to state authority:

> In enacting the *Clean Air Act Amendments of 1970*, Congress attempted to foster a symbiosis between two perceived needs. First, Congress wanted to preserve the basic state and local control of the design and enforcement of air pollution regulation. Besides a deference to the states, such a state role permitted more awareness of individual and local problems in formulating pollution abatement plans.[87]

Needless to say, the generally positive judicial view of partial preemptions is not shared universally by legal experts. In fact, Lewis B. Kaden sees the device as an effective limit on the states' basic right to choose among those services which they feel best meet the needs of their citizens:

> For all their diversity of method, what these provisions share is the feature of "federalizing" or "commandeering" the basic decisionmaking processes of state governments, obliging subnational legislators and executive officials to enact statutes or adopt administrative regulations according to the design and standards set by the federal government. . . . When a part of [the] pool of [state] resources is commandeered to the service of a federal direction—as when a state is ordered to pass a law, establish a regulatory agency, promulgate a regulation, or expend an allocation of funds according to federal design in ways described above—this fundamental capacity for choice is inevitably reduced.[88]

In a world whose only cut-and-dried certainties are death, taxes and an annual National League pennant race which does not include the Chicago Cubs,[89] there are, of course, exceptions to every rule. Thus, despite the courts' general acceptance of partial preemptions, certain agency interpretations of one such statute, the *Clean Air Act*, have triggered judicial opinions which appear to express some of Professor Kaden's concerns and therefore may place parameters—albeit very wide and not altogether clear—on the ability of the federal government to infringe on areas of state sovereignty through the partial preemption mechanism. An example is provided by the somewhat ambiguous history of the "transportation control cases."

Section 110(a) (2)(b) of the *Clean Air Act* amendments mandates the inclusion of transportation control measures in state implementation plans (SIPs) to be employed "as may be necessary" in order to attain and maintain primary or secondary air quality standards. Such controls may include restrictions on vehicle use, altering traffic patterns, and reducing the emissions allowed in-use vehicles.[90]

In 1973, following a circuit court decision,[91] the Environmental Protection Agency (EPA) ordered a number of states to submit transportation control plans with very little further delay. When state protestations took the forms of foot-dragging and inadequate proposals, EPA promulgated its own controls:

> Especially annoying to the states was the instruction in these EPA-promulgated plans that states had to enact statutes or adopt regulations establishing the transportation control programs and committing the requisite funds and personnel. It was EPA's belief, moreover, that because these state actions were required by the (EPA-drafted) SIPs, a state's recalcitrance would subject it to EPA enforcement authorities under Section 113 [of the *Clean Air Act.*][92]

Responding to the initial challenge brought by the State of Pennsylvania,[93] the Third Circuit judged the EPA to be within the parameters of Congressional intent and the Congressional intent within the parameters of the commerce power. Subsequent decisions, however, have questioned that interpretation. Thus, in 1975, both the Fourth and Ninth Circuits held that EPA did not possess the power to force the adoption of particular controls upon the states under threat of federal sanction.[94] Moreover, "[t]hough there was accordingly no need to discuss [the] Constitutional issues, both courts gave clear indication that the EPA scheme exceeded federal power under the commerce clause and violated states' rights under the Tenth Amendment."[95]

The Fourth and Ninth Circuit opinions, a related District of Columbia Circuit opinion distinguishing between "persons" and "states,"[96] and the Supreme Court's decision to vacate and remand for "consideration of mootness,"[97] caused EPA to change its tactics. Hence, the agency promulgated rules requiring the State of California to administer an inspection and maintenance program, asserting now that if California refused to comply it would be acting as a polluter ("person") rather than as a government ("state"):

> No longer arguing that the commerce power embraces federal compulsion of state legislative and administrative acts, EPA now asserted only that the act of polluting

> itself (not being an act of governance) was within the federal commerce power—a position obviously shaped by the teaching of *National League of Cities v. Usery*....[98]

Despite EPA's new strategy, the Ninth Circuit, in 1977, refused to interpret state failure to adopt inspection and maintenance programs as constituting the act of polluting per se, for while the court was "reluctant to interpret the act in a manner that compels consideration of Constitutional issues,"[99] it feared that the EPA distinction between polluting and state action might result in obliterating "the distinction between governance and commerce...."[100]

Muddying the already murky water even further is the very recent case of *U.S. v. Ohio Department of Highway Safety.*[101] At issue in the Ohio case was whether EPA could proceed directly against a state to require state enforcement of an EPA-promulgated inspection and maintenance plan. Again, the appeals court (this time, the Sixth Circuit) refused to accept EPA's "strained construction"[102] whereby a state could be defined as a "polluter." However, in this case, the court found for EPA on the basis of the state as "proprietor":

> Ownership and control of streets and highways, along with the historic practice of licensing vehicles, however, do combine to provide a completely rational basis for placing upon the state the obligation to prevent use of these facilities by noncomplying vehicles. When the state fails to perform that duty it becomes a person in violation of a requirement of the implementation plan. As a violator, the state is subject to the enforcement procedures of Section 113(a) (1).[103]

With this holding, the court dismissed Ohio's Tenth Amendment, *"NLC,"* contentions that the EPA scheme represented "an unconstitutional intrusion into its activities."[104] Rather, the court asserted that a plan

> ... which seeks to enforce state cooperation in an effort to deal with a national problem will not fall under the proscription of the Tenth Amendment if it leaves the states free to make choices which are essential to their functions as states. In the present action, EPA does not seek to revamp the Ohio system of vehicle licensing or, for that matter, of operating its streets and highways. The regulation which EPA seeks to enforce does not require the state to adopt legislation, establish new regulatory agencies or change its procedures for registering vehicles. It merely requires the state to deny use of state-owned facilities to those whose use adds to the national problem of pollution.[105]

As is readily apparent, the transportation control cases make up a bewildering complex of conflicting and sometimes evasive law. First, and most obvious, is the lack of uniformity among the district and appellate level decisions. Second, the Ohio case notwithstanding, the courts have been reluctant to rule either on Constitutional or statutory grounds. Judicial review, in most of the cases, was confined to agency action:

> ...[N]o matter how they may preface their opinions with praise for administrative wisdom, the courts in practice have carefully avoided treating administrative constructions of statutes as conclusive. The agency's views "are only one input in the interpretational equation," to be considered along with a number of other factors customarily used to determine Congress' intention.[106]

Thus, more often than not, the decisions speak only to agency interpretation of Congressional intent—not to the Congressional mechanism itself. And as to the mechanism itself? In sum, the courts have treated partial preemptions as being legitimate under the commerce power, as being part of a healthy cooperative federal system, and, for a variety of reasons, as being nearly immune from Tenth Amendment challenges.

CONGRESSIONAL DIRECT ORDERS

While partial preemptions are by far the preferred Congressional technique for regulating the states through the commerce clause, direct orders are not unknown. Still, they are rare,[107] and, as the best extant example—the *Equal Employment Opportunity Act of 1972*—illustrates, far more "safely" grounded in Congress' power to enforce the 14th Amendment.[108]

Probably, the best example of a commerce power-related direct order may be found in the 1974 amendments to the *Fair Labor Standards Act* (FLSA)—amendments which exemplify the precarious position of Congress in choosing such direct means of regulating the states. These amendments were, after all, the grist of the *National League of Cities v. Usery* battle in which Congress emerged the loser.

As noted previously, however, if the *NLC* decision was notable as a major state victory, it was equally notable for its opacity. Thus, particularly in the realms of "state sovereignty" and "traditional governmental functions," the Court left a number of questions unanswered. For instance, what, beyond the power to locate the state capitol[109] and determine wages, hours and overtime compensation[110] are the attributes of state sovereignty? And, what beyond public safety, health, sanitation and recreation[111] are traditional governmental functions? Moreover, might not a function be *integral* in 1982 without being *traditional* in a chronological sense? Such questions have been the source of endless confusion at the district and appellate court levels—and, once again, much of the confusion has arisen over FLSA rules.

Hence, under Department of Labor (DOL) rules announced December 29, 1979, eight state and local activities were listed as "not traditional" and therefore subject to federal wage and hour regulations:[112]

1) alchoholic beverage stores,
2) off-track betting corporations,
3) local mass transit systems,
4) generation and distribution of electric power,
5) provision of residential and commercial telephone and telegraphic equipment,
6) production and sale of organic fertilizer as a byproduct of sewage processing,
7) production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and
8) repair and maintenance of boats and marine engines for the general public.[113]

Both the National League of Cities and the National Association of Counties were quick to denounce the rules, particularly as they pertain to mass transit systems and electric power. With no clear signal from the Supreme Court, district court rulings on the subject have been inconsistent—the mass transit regulations being ruled legitimate in Macon, GA[114] and New Castle, DE,[115] but unconstitutional in San Antonio, TX.[116]

In fact, since the 1976 *NLC* case, probably the most ambitious attempt to identify and refine those state functions protected from federal direct orders promulgated through the commerce power came from Judge Shannon of the Sixth Circuit in 1979. Thus, in *Amersbach v. Cleveland*,[117] the appeals court observed that

> [b]y analyzing the services and activities which the [Supreme] Court characterized as typical of those performed by governments, we note certain elements common to each which serve to clarify and define a method by which a protected government function may be identified. Among these elements are: (1) the government service or activity *benefits the community as a whole and is available at little or no direct expense;* (2) the service or activity is *undertaken for the purpose of public service rather than for pecuniary gain;* (3) *government is the principle provider* of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a *communitywide need for the service or activity.*[118]

In 1982, two major cases challenging federal direct orders on Tenth Amendment grounds came before the Supreme Court. The results of each appeared to signal, at least temporarily, the demise of the *NLC* defense.

Hence, the Court ruled unanimously in *United Transportation Union v. Long Island Rail Road*[119] that operating railroads is not a traditional state or local activity. While the case constituted a challenge to strike provisions of the *Federal Railway Labor Act*, the decision probably foreclosed successful state and local litigation seeking a favorable Supreme Court holding on FLSA provisions relating to mass transit.

In fact, the *Long Island* decision was not unexpected—the Court had hinted in *NLC* itself that railroads might constitute a special unprotected category.[120] More distressing to those hoping for a Tenth Amendment revival was the Court's upholding of the *Public Utilities Regulatory Policies Act* (PURPA). In fact, when challenged at the district court level, Judge Cox found that the act so overreached the bounds of the commerce power as to result in a "clear usurpation of power that the federal government simply does not have. . . ."[121]

In *Federal Energy Regulatory Commission v. Mississippi*,[122] however, the Supreme Court found that PURPA, an odd mix between direct order and partial preemption,[123] does "not trench on state sovereignty in violation of the Tenth Amendment," but rather, "does nothing more than preempt conflicting state enactments in the traditional way."[124] The dissent vehemently disagreed, calling PURPA and the ruling "contrary to the principles of *National League of Cities v. Usery* . . . , antithetical to the values of federalism, and inconsistent with our Constitutional history."[125]

Regulating Through the Spending Power: The Congressional Conditioning of Federal Aid

As noted above, in *National League of Cities v. Usery*, the Court declared unconstitutional Congressional extension of the *Fair Labor Standards Act* to the majority of state and local employees, alleging that the amendments violated the Tenth Amendment by "significantly alter[ing] or displac[ing] the states' ability to structure employer-employee relationships. . .,"[126] thereby "directly displac[ing] the states' freedom to structure integral operations in areas of traditional governmental functions. . . ."[127] Providing such functions, reasoned the Court, is "essential to [the] separate and independent existence" of the states.[128] Strong words, indeed. However, as the discussion above has shown, the federal government may, for all practical purposes, affect a good many "integral operations" through the partial preemption technique without encountering any serious *"NLC"* difficulties.

Of equal (and more frequently occurring) importance may have been Justice Rehnquist's majority admission hidden amid the footnotes of the *NLC* decision: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power. . . ."[129]

In the first section of this chapter we discussed briefly the Congressional spending power, its basis in Article I, Section 8 of the Constitution, and a few of the earlier Supreme Court decisions interpreting it. Hence, at the most elementary level, a grant of money awarded under the spending power may be said to create a contractual arrangement. Moreover, any conditions attached to the "contract" need only be reasonably related to a legitimte national purpose[130] and they must be attached to grants which provide the potential recipient with an option *not* to accept, so that the grant may be said to "induce" but not 'coerce."[131]

In a very significant way, however, the grant "contract" differs from other contracts. According to Professor Richard B. Cappalli:

> . . .[A] basic feature of the federal grant is the lack of negotiation by the grantee prior to the award. The federal agency unilaterally determines, on is own or pursuant to a statutory formula, the project's costs and awards that amount. The terms accompanying the grant award are similarly nonnegotiable.[132]

Thus, the state or local grant recipient is not really on equal contractual footing with the federal grantor. And, in fact, unlike private citizens or institutions," state[s and localities] cannot claim Fifth Amendment protection from arbitrary federal action."[133]

It is not the purpose of this section to explore the entire realm of grant law—a young, perplexing and still little understood province of the law.[134] Rather, the present inquiry is limited to conditions attached to grants. Yet, the overlying notion of a somewhat imbalanced convenant is crucial to an understanding of the conditions themselves. Moreover, the fact that the courts have tended to treat the newer methods of grant regulation—crosscutting requirements and crossover sanctions—in much the same way as they have treated grant-in-aid conditions for the past half-century warrants a general discussion of the modern legal standing of grant regulations and regulatory devices.

THE CONDITIONAL SPENDING POWER IN THE COURTS

The now popular and increasingly catch-all term "mandate" has nowhere been applied more frequently than in relation to grant-in-aid conditions. Thus, inasmuch as a mandate is synonymous with an order, the casual observer could arrive at the conclusion that a federal grant condition allows about as much discretion to those it potentially touches as a Hitlerian diktat. Indeed, the frequency and level of complaints from states and localities as well as a growing army of sympathizers in the federal government and academia attest to a widespread perception that such grant-related mandates have a virtual stranglehold on state and local grant recipients. The contractually based notion that compliance is voluntary ("if you don't like the rule, don't take the money") is, within the context of fiscal realities, considered by many antiquated if not absurd.

However, if the political attitude toward grants and their attendant strings has changed (or at least become considerably more vocal) in recent years, the legal ground rules have remained practically unaltered since 1923.[135] Hence, although in the intervening 54 years, grants have become pervasive and their conditions complex, the judicial conception of fiscal and political free-will remains unaffected, as excerpts from these recent decisions show:

> The state, by entering into this venture, *voluntarily submitted itself* to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable laws.[136]

> Neither states nor their political subdivisions are compelled to participate in the grand federal scheme created by the act and thereby receive money. The participation is *purely at their option*.[137]

> It must be remembered that this act is *not compulsory* on the state.... [It] gives to the states an option to enact such legislation and in order to induce that enactment, offers financial assistance.[138]

The courts, then, have viewed grant agreements—conditions and all—as completely voluntary mechanisms for disbursing federal funds and indeed, one can make a very good case for this "caveat emptor" approach, in spite of the often onerous nature of such agreements. Thus, in his seminal statement on the matter, Justice Cardozo offered an eminently practical line of reasoning:

> ...[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of will as a working hypothesis in the solution of its problems.[139]

Yet, not every Constitutional expert would agree with Cardozo and his judicial successors. For instance, Professor A.E. Dick Howard has called such reasoning "simplistic:"

> It makes Constitutional limitations on Congress' power illusory by permitting Congress to do indirectly what it cannot do directly. The principle is that of unconstitutional conditions. Simply because government need not create a benefit (e.g., a deduction from one's income taxes for

> charitable deductions), it does not follow that the government may attach such conditions as it pleases to that benefit. Government may not require me, as a condition of taking the deduction, to attach an affidavit swearing that I do not believe in the principles of world communism. It is no answer to say that I have a "choice"—file the affidavit or forego the deduction. Similarily, the Constitutionality of conditions attached to federal grants is not assured simply by declaring that a state is "free" to refuse the federal money if it objects to the conditions.[140]

Moreover, as Richard Cappalli points out, there is an after-the-fact component to the grant agreement:

> An important grant principle which deviates from traditional contract rules, is that one partner, the United States, can unilaterally modify the terms of the relationship during the term of the grant. By statute or regulation the United States can impose additional obligations under the agreement, although Constitutional restrictions on the impairment of contracts limit that power to some degree.[141]

Thus, under certain circumstances, the federal government may change the rules of the game after the grantee has already bought into the "contract"—often an extraordinary investment. Though not technically a grant, a leading example is again[142] provided by unemployment insurance.

In 1970, Congress extended unemployment insurance coverage to state employees in hospitals and higher education[143] and in 1976, to all state and local employees.[144] After over 40 years of participation in the program, the effect of the amendments was to offer a Hobson's choice to the states:

> 1) to conform and tax themselves and their political subdivisions the costs of unemployment benefits, or
>
> 2) to fail to conform and accept the utter demise of the states' existing unemployment compensation program.[145]

Given such an option, the states, of course, were realistically forced to comply—and at considerble cost:

> ...[The] federal contribution to the costs of the newly required public sector coverage must be compared to the very substantial costs to state and local governments themselves. The cost of benefits alone has been estimated to range from $385 million to over $1 billion annually over the next few years, solely as a result of the additional coverage mandated by PL 94-566. Even at the lower estimate, the cost burden to state and local governments is 48 times the federal contribution to implementing public employee coverage.[146]

At first blush, all of this would appear not only to be coercive but, using *National League of Cities* logic, to be an infringement upon the Tenth Amendment rights of the states. However, the Court's prediction that Congress might accomplish certain objectives through its spending (and by extension, taxing) prerogatives that it could not accomplish through the commerce clause was borne out when the amendments were challenged. Thus, in 1980 the Supreme Court refused to review a lower court's upholding of the 1976 amendments on the grounds that the unemployment insurance program was technically voluntary and, therefore, not subject to Tenth Amendment restrictions.[147] Such decisions have prompted Professor Howard to lament that "*NLC* is an empty vessel waiting to be filled up."[148]

Crosscutting Requirements and Crossover Sanctions: Traditional Legal Responses to Novel Congressional Techniques

Grant conditions come in a number of forms—the most common being relatively innocuous, program-specific requirements. However, as the previous chapter has shown, the past 20 years have witnessed the development and increasing use of conditional techniques—specifically, the crosscutting requirement and the crossover sanction—which, practically speaking, are quite distinct from their program-specific counterparts. Yet, despite practical differences, in a narrow legal sense, the courts have upheld these mechanisms as perfectly valid exercises of the spending power.

The modern prototype of crosscutting requirements is Title VI of the *Civil Rights Act of 1964*[149]—an act with an interesting genesis indeed, for in its gestation period, the technique was apparently considered not only to be quite unique, but to stand on fairly shaky legal ground as well. Hence, responding to a 1963 proposal by his Civil Rights Commission that federal aid to Mississippi be cut, President Kennedy asserted that:

> I don't have the power to cut off the aid in a general way as was proposed by the Civil Rights Commission, and I would think it would probably be unwise to give the President of the United States that kind of power because it could start in one state and for one reason or another it might be moved to another state which was not measuring up as the President would like to see it measure up in one way or another. I don't think that we should extend federal programs in a way which encourages or really permits discrimination. That is very clear. But what was suggested was something else and that was a general wholesale cutoff of federal expenditures, regardless of the purpose for which they were being spent, as a disciplinary action on the State of Mississippi. I think that is another question, and I couldn't accept that view.[150]

As the above quotation illustrates, even as late as the 1960s, policymakers found it difficult to envision the Constitutionality of a program under which Congress would "confer on the executive broad authority under the Spending Power to effectuate social policy. . . ."[151] Politically, such concerns became less compelling "after Bull Connor . . . let loose his dogs on black children in Birmingham on nationwide television. . . ."[152] Responding to events in the south, President Kennedy reversed himself and backed an across-the-board prohibition on discrimination in the use of Federal aid:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by federal, state, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the executive have their responsibilities to uphold the Constitution also. . . .
>
> Instead of permitting this issue to become a political device often exploited by those opposed to social and economic progress, it would be better at this time to pass a single comprehensive provision [i.e., a cross-cut] making it clear that the federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance or otherwise—to any program or activity in which racial discrimination occurs. This would not permit the federal government to cut off all federal aid of all kinds as a means of punishing an area for discrimination occuring therein—but it would clarify the authority of any administrator with respect to federal funds or financial assistance and discriminatory practices.[153]

Once established in connection with civil rights—a social policy of unquestionable necessity, Constitutionally grounded in the Fifth Amendment prohibition against federal financing of governments or other entities which discriminate[154]—the crosscutting device encountered little legal difficulty. While other such requirements—including those copied almost word-for-word from Title VI[155]—have not received the same judicial hands-off treatment as the civil rights statute,[156] the crosscutting device itself has been left Constitutionally unscathed, despite the fact that generally applicable requirements may "not [be] reasonably related to achieving the purposes of the spending programs to which they are attached."[157] Thus, although such conditions have added a third dimension to the legality of grant requirements—the federal government may "prevent the use of federal funds for purposes contrary to general government policies"[158]—they are, in the greater legal scheme of things, just conditions—and, a condition is a condition is a condition.

So too, the crossover sanction is a perfectly legitimate conditional device, albeit a device with a unique twist—failure to comply with program requirements may endanger continued funding of other, distinct programs.[159] It is just that feature which Lewis Kaden finds not only unique, but assails as being the most objectionable of all conditional techniques in terms of restricting state sovereignty.[160] Yet, in response to a Montgomery County, MD, challenge to the *National Health Planning Act*, a district court declared that:

> The act imposes no civil or criminal penalties on such states or their officials. While the withholding of federal funds in some instances may resemble the imposition of civil or criminal penalties and while economic pressure may threaten such havoc to a state's well-being as to cause the federal legislation to cross the line which divides inducement from coercion, that line is not crossed in this case. Nor does the act displace local initiative with federal directives. The act mandates essentially a cooperative venture among the federal government and state and local authorities.[161]

Similarly, a North Carolina decision, affirmed by the Supreme Court, upheld the same act despite the fact that it conflicted with North Carolina's Constitution.[162]

More recently, the District of Columbia Court of Appeals upheld a provision of the *Social Security Act* which conditions state receipt of Medicaid funds upon the states' "passing-through" Congressionally approved cost of living increases to Supplemental Security Income recipients. In the case of *Oklahoma v. Schweiker*[163] states argued that the "pass-through" provision constituted an unconstitutional exercise of the spending power and a violation of the Tenth Amendment because the condition was completely unrelated to the Medicaid program. Speaking for the court, however, Judge Mikva dismissed state argumentation, ruling that:

> The contention that the pass-through provision is unconstitutional because there is no relationship between a state's supplementary payments and the Medicaid program is overly simplistic....
>
> ... Congress' ... ability to impose conditions on the receipt of federal funds is ... unquestioned. Although there may be some limit to the terms Congress may impose, this court has been unable to uncover any instance in which a court has invalidated a funding condition.[164]

Pennhurst: Sui Generis Ruling or Judicial Forecast?

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the "contract" .... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.[165]

In its 1980–81 term, the Supreme Court considered a challenge to conditions at a Pennsylvania state institution for the mentally retarded. The challenge was based in part on the *Developmentally Disabled Assistance and Bill of Rights Act of 1975*—specifically, the "bill of rights" component. The Court's response, capsulized in the quotation above, noted that the "bill of rights"—worded in terms of legislative "findings"—represented, at most, a

Congressional preference and, in the absence of language specifically saying so, could not be construed as a condition of aid. Congress was thus admonished for its tendency to favor statutory obscurity. Moreover, the decision in *Pennhurst State School and Hospital v. Halderman* could potentially set "the stage for attacks on *administrative* implementation of grant strings—through regulations, guidelines, etc.—on the ground that the agency has imposed duties beyond those in the relevant statute itself."[166]

Two additional statements made by the Court in *Pennhurst* may—though *won't necessarily*—have a profound affect on future judicial grant rulings. Thus, Justice Rehnquist's majority opinion warned that: "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating states with post-acceptance or 'retroactive' conditions."[167] While it is unclear (by no means has Congress cornered the market on inexactitude) what would constitute a "retroactive" condition, it is at least conceivable that "[t]aken seriously, this approach would call into question basic features of the grant system such as enactment of new crosscutting conditions which apply to existing programs."[168]

Adding even more to the ominous tone taken by the Court in *Pennhurst* was a footnoted suggestion that "[t]here are limits on the power of Congress to impose conditions on the states pursuant to its spending power."[169] Thereafter, among other cases, the majority cited *National League of Cities v. Usery*. Whether or not this may be taken as an intimation that the Court will, in the future, be disposed to "fill up the empty *NLC* vessel" is impossible to know—a footnote does not a strong precedent make. "Still," according to Professor George Brown, "Supreme Court footnotes are often harbingers of things to come; and this particular statement may force lower courts to take more seriously challenges to grant conditions based on state sovereignty grounds."[170]

IMPLEMENTATION IN THE COURTS: SUING FOR JUDICIAL REGULATION

Despite recent "hints" such as those contained in *Pennhurst*, the federal judiciary may still be characterized as accomodative to Congressional uses of the commerce and spending powers. It has been, then, an acquiescent judiciary. However, like classic schizophrenics, the courts have, in addition, displayed another, quite different face—thus earning, over the past quarter-century, the more commonly heard epithet, activist judiciary.

The notion of the courts as arenas of activism is, of course, generally traced to 1954 and the Warren Court's decision in *Brown v. Board of Education*.[171] Thereafter, the federal courts continued on their "activist course" delivering additional decisions in the area of desegreation, as well as the areas of criminal procedure, civil liberties and reapportionment.

The effect of these decisions on the social, economic and political fabric of America was profound. First, the series of civil rights rulings ended a long and shameful era of legal discrimination. Second, in terms of criminal procedure and civil liberties, the Court set about the task of modernizing the Bill of Rights both by fashioning new guarantees and through the incorporation of most of its provisions into the 14th Amendment. Finally, through its reapportionment decisions the Supreme Court restructured political representation throughout much of the nation.

That these decisions also had powerful effects upon the American system of federalism is undisputed. They were, after all, federal judicial decisions mandating often massive changes in local school districts, ordering alterations in state and local criminal processing, and overturning state apportionment plans—thus delving into the very heart of state political autonomy. Without doubt, the Warren Court era saw the ascendancy of individual rights over federal principles. However, that, in and of itself, was certainly nothing new, for as one observer has noted, "The relationship between the themes of federalism and individual rights is one that runs deep in American intellectual and social history."[172] A proper balance of the two has always seemed just outside the grasp. Yet, whether or not Warren Court mandates ran roughshod over state and local prerogatives is subject to debate and an important factor in determining whether the newer (post-1970), primarily lower court activism imposing affirmative obligations on state and local institutions is a different, more intrusive, and more compulsory form of judicial regulation than that of the 1960s.

In terms of federal-state relationships, by far the most controversial of the Warren Court's "regulatory" decisions have been those involving criminal procedure and reapportionment.[173] Thus, Neil D. McFeeley contends that "[w]hile those Warren Court decisions on due process and habeas corpus furthered progress in the protection of individual freedom, they had serious and negative institutional effects which the Warren Court majority considered negligible if indeed they considered them at all in the rush to protect defendants' rights. These negative effects were most vivid in the criminal justice system and in the area of judicial federalism."[174]

Not everyone, of course, would agree with Professor McFeeley's assertion that the Warren Court did not consider state and local institutional effects. Indeed, citing three major criminal procedure cases spanning the Warren and Burger Courts (*Griffin v. Illinois,*[175] *Douglas v. California,*[176] and *Bounds v. Smith*[177]), Gerald E. Frug contends that they

> ... involve a ... limited intrusion into local democratic decisionmaking.... The Court did not design a detailed list of requirements that a state must provide, regardless of cost, in order to meet constitutional standards ... but emphasized flexibility and local experimentation. The Court did not establish standards of quality that necessitate continuing judicial supervision of their achievement.... In short, because unavoidable mandated costs are relatively small, these cases are likely to cause little impact on the democratic management of government, and because the federal judicial intrusion is limited, little unwarranted federal control of state decisionmaking is required.[178]

Finally, Phillip B. Kurland believes that much of the intergovernmental lamentation which such cases occasioned was actually little more than a subterfuge: "The outcry on behalf of federalism ... seems to hide more than it reveals. [In the criminal process cases], no more than in the case of desegregation or reapportionment, do the more rabid critics deplore the fact that the rules were made by the national government as much as they do the rules themselves."[179]

It is probably, however, the reapportionment cases which have caused the most concern among legal scholars over the balance of power in intergovernmental relations, for these decisions, in effect, altered the very structure of federalism:

> Commencing with *Wesberry v. Sanders* in 1964, the Supreme Court began to limit the states' ability to control the process of Congressional election districting. District lines must now be drawn to approach numerical equality among the constituencies. Neither municipal boundaries nor attempts to avoid political gerrymandering will excuse even slight deviations from mathematical equality. The courts have also scrutinized state plans to ensure contiguity and prevent use of the districting power to exclude minorities from political representation. At a minimum, the political effect of the decisions mandating substantial equality of Congressional districting has been to diminish the influence of state parties on the composition of Congress, and to shift a measure of political power from the previously overrepresented rural areas to the cities and, more recently, to the increasingly populous suburbs.[180]

According to Kurland, the Court accomplished this rather astounding structural and political revolution "with the precision and determination of a toy soldier that had been wound up and pointed in a certain direction."[181]

Yet, despite their high degree of intrusiveness, even the reapportionment cases did not mandate the sort of large monetary costs which have come to be associated with contemporary intergovernmental regulations. And, in this way, among others, they may be distinguished from the "new" judicial mandates—particularly in the area of institutional remedies.

Federal Judge as State Legislator and Administrator: The Institution Cases

If nothing else, the lower court "institution cases," ruling upon and ordering changes in state prisons,[182] local jails,[183] state mental institutions,[184] and juvenile detention facilities[185] are notable for their volume.[186] Yet, the quantity of such cases is hardly their distinguishing characteristic—in the United States, the phrase, "burgeoning field of case law," is a redundancy if ever there was one. Rather, they are differentiated by an unusual degree of judicial intrusion:

> Federal district judges are increasingly acting as day-to-day managers and implementers, reaching into the details of civic life: how prisons are run, medication is administered to the mentally ill, custody is arranged for severely deranged persons, private and public employers recruit and promote. Though judicial authority and democracy have always co-existed in tension, as federal judges assume a more active managerial role, politicians and citizens chafe for quite pragmatic reasons.[187]

It should be noted that few would dispute the findings, in most such lower court decisions, that generally conditions in the institutions under order are deplorable. For instance, in the Supreme Court's recent *Pennhurst* decision (decided, in part, at the lower court level on Constitutional grounds but solely on statutory grounds by the Supreme Court), Justice Rehnquist admitted that:

> Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but inadequate for the "habilitation" of the retarded. Indeed, the court found that the physical, intellectual and emotional skills of some residents have deteriorated at Pennhurst.[188]

With such findings in hand, it would be extremely difficult for even a moderately compassionate jurist not to order changes—indeed, whether in the hands of a compassionate or heartless judge, findings of Constitutional violation demand changes which would bring the offending institution into compliance with the Constitution. However, in contrast to court actions of only a decade or two ago which tended to lean toward locally designed compliance plans and implementation with "all deliberate speed," the newer court orders are often marked by demands for immediate compliance with court-designed plans—the only alternative being that the offending jurisdiction shut down all or part of its prison system, mental institution(s), jail(s), etc.:

> Let there be no mistake in the matter; the obligation of the respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the governor may do, *or, indeed, upon what respondents may actually be able to accomplish.* If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States.[189]

In a sense, such orders share the characteristics of legislative partial preemptions—"you don't have to, but. . . ." Yet, as the language noted above suggests, the "but" portion of the equation offers even less option than that found in partial preemptions. There is no offer of a federal pickup and while the lack of a clean air plan would pose a serious long-range health problem, it pales in comparison with the immediate "health" problem posed by the release of a state's entire population of convicted murderers and rapists.

Simply, then, a state *must* comply. And, the budgetary effects can be tremendous. Thus, the National Prison Project of the American Civil Liberties Union estimated Alabama's costs of compliance with a 1976 district court order to be nearly $30 million, including:

- ☐ additional annual operating costs of $3.5 million. This would include

> about $1.6 million for new staff, about $1.2 million for upgrading food services, and other items;
>
> ☐ additional capital costs of $20.6 million. Of this total some $18.5 million would go to renovating or constructing residential areas at five facilities in order to meet the Court's requirement that each inmate be given at least 60 feet of living space and a single cell; and
>
> ☐ additional program costs of from $2.6 to $4.3 million, depending on how soon the state complies with the single cell requirement. This included $1.9 million for education/vocational training, $1.7 million for work release, pre-release centers and road camps, plus $600,000 for prison industries, and $94,000 for transition re-entry programs.[190]

Gerald Frug cites two aspects of such orders which "suggest that they are a greater intrusion into democratic [state-local] decision-making than normal invalidation of law on constitutional grounds:"

> Rather than preventing the government from acting in an unconstitutional way, these orders mandate affirmative action by the legislative and executive branches to correct a Constitutional violation. Moreover, the court orders involve a subject matter that is the very foundation of the discretion that is lodged in the other branches [as well as autonomous state governments]: the raising, allocation, and spending of government funds.[191]

Donald Horowitz agrees:

> The decree of a federal district judge ordering mental hospitals to adhere to some 84 minimum standards of care and treatment represents an extreme in specificity, but it is representative of the trend toward demanding performance that cannot be measured in one or two simple acts but in a whole course of conduct, performance that tends to be open-ended in time and even in the identity of the parties to whom the performance will be owed. Remedies like these are reminiscent of the kinds of programs adopted by legislatures and executives. If they are to be translated into action, remedies of this kind often require the same kinds of supervision as other government programs do.[192]

Finally, even as liberal an observer as Archibald Cox has some questions about this form of judicial policymaking:

> But are federal courts all over the country to decide the policy questions, levy the taxes and distribute the revenues? Not to act would be to acknowledge judicial futility. To act would be to adopt a tax and fiscal policy for the state. It might even become necessary to set up the machinery to make policy effective. In addition to questions of competency, those of legitimacy would surely arise. Even in the case of legislative default, does a federal court—usually a single judge—have legitimate power to levy taxes on a people without their consent, and to decide where and how public money shall be spent?[193]

Once more, of course, the problem of federal judicial intrusiveness runs headlong into the question of individual rights. A very good argument can be made that the individuals involved in the institution cases are far more in need of protection by some source outside the normal democratic processes than the rest of us— being, for the most part, involuntarily held and denied voting privileges. In such instances, is there room for judicially balanced decisions, considering democratic and federal principles alongside individual rights? Yes, according to Frug, particularly in an era of diminishing fiscal resources:

> Such a division of government budgets between voluntary and involuntary recipients provides the basis for Constitutional analysis, but, if strictly applied in this era of limited re-

> sources, it would seriously reduce the legislature's ability to allocate government resources.... Many beneficiaries of court orders are not entitled to vote, but neither are the children whose access to education, libraries or welfare benefits might be curtailed to pay for the court order.... To some it may seem odd—perhaps conservative is the word—to suggest that the limits on federal judicial power have any relevance when the courts are seeking to fashion individual liberties. But if the courts were to have plenary power to define constitutional values, and then control by equitable decree the spending of the money appropriated, they would be exercising all power of government—judicial, legislative, and executive.[194]

THE SUPREME COURT AND THE INSTITUTION CASES: SENDING A MESSAGE OR SIDESTEPPING THE ISSUE?

In its 1980–81 term, the Supreme Court ruled in two of the long-pending institution cases—*Rhodes v. Chapman*,[195] a prison overcrowding case, and *Pennhurst State School and Hospital v. Halderman*,[196] the mental institution case mentioned previously. In both cases, the Court ruled against the institutional respondents. Yet, whether either case may be viewed as a high court signal to the lower federal courts has been clouded by the facts in *Rhodes* and the Court's refusal to rule on Constitutional grounds in *Pennhurst*.

The Court's decision in *Rhodes* that the double-celling of prisoners did not constitute cruel and unusual punishment under the Eighth and 14th Amendments because "[t]o the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society,"[197] was met with much ado both by prison administrators and civil rights advocates—both, of course, "ado-ing" from quite different perspectives. It was all, however, probably "much ado about nothing."

Compared to most of the nation's prisons, the Southern Ohio Correctional Facility—double-celling notwithstanding—is a model institution:

> SOCF was built in the early 1970s. In addition to 1620 cells, it has gymnasiums, workshops, school rooms, "day rooms," two chapels, a hospital ward, commissary, barber shop, and library. Outdoors, SOCF has a recreation field, visitation area, and garden. The District Court described this physical plant as "unquestionably a topflight, first-class facility."[198]

Such conditions may be compared with those in another prison which the lower courts found clearly unconstitutional and which the Supreme Court itself offered as an example of Constitutional violation:[199]

> [I]nmates are compelled to live in constant fear of violence, in imminent danger to their physical wellbeing, and without opportunity to seek a more promising future....[200] [L]ack of sanitation throughout the institutions—in living areas, infirmaries, and food service—presents an imminent danger to the health of each and every inmate. . . .[201] Plumbing facilities are in an exceptional state of disrepair. . . .[202] Maintaining personal hygiene is an 'insurmountable problem'. . . .[203] The electrical systems are totally inadequate, and exposed wiring poses a constant danger to the inmates. . . .[204] The food is generally unappetizing and unwholesome. . . .[205] Inmates suffer physical deterioration from lack of opportunitites for exercise and recreation. . . .[206]

Thus, the facts in *Rhodes* did not easily lend themselves to a general pronouncement on extensive federal judicial intervention in instances where gross constitutional violations exist. Despite this inconclusiveness, however, Justice Powell's lead opinion did appear to warn the lower courts about excessive intrusiveness:

> When conditions of confinement amount to cruel and unusual punish-

> ment, "federal courts will discharge their duty to protect constitutional rights." In discharging this oversight responsibility, however, *courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution* or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system....[207]

For different reasons, the Court's opinion in *Pennhurst*, while probably significant for purposes of grant law, is not particularly resolute in terms of the institution cases, most of which are decided on Constitutional grounds. While the district court found that conditions at Pennhurst violated both the Eighth Amendment and the Equal Protection Clause, the court of appeals—substantially affirming the district court's extensive remedial order—avoided the Constitutional claims of the institution's residents, ruling instead on purely statutory grounds. Thereafter, the Supreme Court found it unnecessary to address the Constitutional questions. Thus, although the Court overturned the remedial order in its remand, any Constitutional issues—and, potentially, any remedy based on Constitutional claims—were thrust back on the court of appeals.

Understandably, the Supreme Court is always hesitant to rule on broad Constitutional questions when ruling on a statutory basis will suffice—particularly if a Constitutionally based decision would create new affirmative obligations. Its word, unlike that of an appeals or district court, is final and binding throughout the nation. Hence, in its *Rhodes* decision, the Court admitted that its negative judgment was influenced by such concerns:

> This court must proceed cautiously in making an Eighth Amendment judgment because, unless we reverse it, "[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment," and thus "[r]evisions cannot be made in the light of further experience.'[208]

Similarly, no doubt, the justices' avoidance of Constitutional questions in *Pennhurst* resulted from their reluctance to advance a series of new Constitutional rights for the mentally retarded:

- a federal Constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment" regardless of whether they are voluntarily or involuntarily committed,
- a Constitutional right to "be free from harm" under the Eighth Amendment, and
- [a Constitutional right] to be provided with "nondiscriminatory habilitation" under the Equal Protection Clause.[209]

Not surprisingly, the Supreme Court's avoidance of the Constitutional question in *Pennhurst* may be influencing the lower courts. Hence, four months later, Chief Judge Devine of the U.S. District Court for New Hampshire decided that:

> *Contrary to the [mentally retarded] residents' contentions, however, there is no* statutory [under the *Developmentally Disabled Assistance and Bill of Rights Act*] or *Constitutional basis for requiring that the state provide habilitation in the least restrictive environment*, and the resident's substantive due process claim to that effect is hereby rejected.[210]

"OUR FEDERALISM"[211] AND INTERGOVERNMENTAL REGULATION: IS THERE A JUDICIAL ROLE IN REGULATORY REFORM?

To many, having read the foregoing pages, the answer to the question set forth above may seem obvious. If states and localities are now overregulated (or at least badly regulated) by the federal government, the federal courts are not without blame. It follows, therefore, that being part of the problem, the federal judiciary should be part of the solution. Yet, "solutions" arrived at in the judicial forum—particularly those of a Constitutional nature—are always the most controversial of remedies, a fact of

American life aptly summed up (if at our expense) by an astute foreign observer:

> At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start.[212]

Such heady arguments, of course, may and do take place in the Halls of Congress, the Oval Office, and, for that matter, the corner bar, but through tradition and jurisdiction it is the federal judiciary and ultimately the Supreme Court which finally disposes of Constitutional questions. And, if we may be likened to straining greyhounds during the argument, those of us who perceive ourselves to be losers at its conclusion can be expected to react toward the "umpire" like those same dogs unleashed.

The Acquiescent Judiciary: Should It Be More Activist?

> This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure.... "[E]ffective restraints ... must proceed from political rather than from judicial processes."[213]
>
> ...[T]he states, and their interests as such, are represented in the Congress but not in the federal courts.[214]

Both of the above arguments have frequently been advanced as justifications for judicial deference to Congressional uses of the commerce and spending powers. The one, in essence, is a recognition of the fact that the Court, as the lest democratic branch of government, should keep to a minimum the number of instances in which it overrules the most democratic branch. The second holds that Congressional policy affecting the states runs little risk of destroying the integrity of the states since, in effect, Congress is a composite of the states.

Whether or not the courts should maintain a deferential posture toward the Congress, the first rationale for doing so would appear to be the more valid of the two. Indeed, a good argument can be made that a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values.

Thus, in terms of structure, Congress did at one time reflect state values: Senators were chosen by their state legislatures and, the 15th Amendment notwithstanding, the states controlled the composition of the electorate. As early as 1913, state structural preponderance was weakened by the ratification of the 17th Amendment and the direct popular election of United States Senators. However, it was not until a half-century later that the combined impact of the four voting amendments, the *Voting Rights Act*, and the Supreme Court's reapportionment decisions resulted in a state structural influence more mythical than real.

Perhaps even more significant has been the gradual decline in the political influence of state and local interests at the national legislative level. Brought about in large measure by the weakening of the local party organization and the technological unshackling of the national media, that decline is both manifested in and exacerbated by the individual members of Congress:

> The past 25 years have brought enormous changes in the types of persons elected to the Senate and House, and in the techniques used in their successful campaigns. The core element in this transformation has been the decline in importance of state party organization, itself a product of several related forces—the effect of money on politics, the changing use of media in campaigns, the phenomenon of celebrity success in politics, and the substitution of welfare state programs for the community service functions of the neighborhood political organization. The consequences are varied, but clearly point in one direction. As Senators and members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor,

> each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced.[215]

One of the most respected jurists in American history, Justice Oliver Wendell Holmes, once remarked that "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."[216] Years later, the great legal scholar Herbert Wechsler asserted that questions of states' rights are not the proper purview of the courts but rather are questions to be settled in political forum.[217] Ironically, Wechsler's 1954 article dealt with and was titled, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government." With those safeguards now badly eroded, a number of legal analysts believe that questions of state sovereignty "warrant some broader measure of judicial supervision than the courts have recently supplied."[218] And, most such advocates pin their hopes on a revival and expansion of *NLC*.

For instance, A.E. Dick Howard believes that the principles of *NLC* could be applied to "grant programs that dictate that states, in order to qualify, must structure their administrative machinery in ways specified by federal regulations."[219] In many cases, such regulations affect the "states as states," alter "attributes of state sovereignty," and impair the ability of states "to structure integral operations in areas of traditional functions." To dismiss the three *NLC* criteria on grounds that costly conditions of aid, established after-the-fact, are merely part and parcel of a voluntary agreement, is to say, according to Howard, that there are not limits on the Congressional power over the states.

Many analysts, while applauding the Court's renewed sensitivity to state sovereignty principles in its *NLC* decision, feel that the logic underlying the opinion was basically unsound and therefore of limited future applicability. Indeed, the limited use to which *NLC* has been put in the past five years would appear to add a measure of validity to such criticisms. Nonetheless, even among those who doubt the logic of *NLC*, some feel that its postulates may be worthy of further judicial gloss.

Thus, although he sees very serious weaknesses in the *NLC* doctrine, Lewis Kaden believes it could legitimately trigger court intervention "when a federal program coopts the state's political processes by interfering with legislative and executive direction in a significant way. . . .[220] Again, like Howard, Kaden asserts that whether the commerce or spending power is involved, a Congressional directive which forces states to restructure existing or create new administrative machinery is a serious invasion of the states' essential freedom to be able to "conduct their political processes and use their fiscal, political and personal resources in ways determined internally."[221]

The Activist Judiciary: Should It Be More Acquiescent?

> Courts that make rules for universities, prisons, welfare agencies, or other bodies take on the functions of legislatures. But courts are afflicted with a kind of tunnel vision. A judge is not in a position—nor does he have the warrant—to balance competing political and economic interests as legislators are accustomed to doing. Yet he can order heavy expenditures of public funds to carry out his decisions, and that means either that taxpayers will pay more or that other public projects will get less.[222]

Or, put in more homely terms:

> A federal judge rearranging a state's penal or educational system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results.[223]

The above remarks conjure up images of meddling federal judges, unconcerned with the state political processes they amend or nullify. Yet, clearly, one of the chief responsibilities of the federal judiciary is the protection of Constitutional rights. Indeed, if anything is more precious than 'Our Federalism," it must be our individual rights. And when a state abuses those rights—whether they be the rights of an upstanding citizen or a hardened criminal—federalism or states' rights can be no excuse for the continuation of abuse.

The Constitution, however, contains more than the first nine and 14th amendments. It is, in addition, a document mandating democratic processes and a federal system and these too, to varying degrees, must factor into the decisions of federal judges. Moreover, as resources become increasingly limited, the question arises whether courts should be more sensitive to economic costs when fashioning Constitutional remedies? Must the integrity of state budgets and political processes be sacrificed in the drive for equitable relief? In other words, is balance possible (or even desirable) in judicial decisionmaking where individual rights are involved?

Before the form of judicial relief is determined, a federal court must decide whether it is proper to intervene in the first place. In fact, one of the chief complaints about the federal judiciary has been that it intervenes far too frequently into state and local criminal processes and institutional management when state courts may be fully competent to safeguard Constitutional rights. As Judge Henry J. Friendly has observed:

> It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states. Yet we also have state courts, whose judges, like those of the federal courts, must take an oath to support the Constitution and were intended to play an important role in carrying it out.[224]

Insofar as the institution cases are concerned, it would be a gross understatement to say that no precise test for intervention exists. As Justice Harlan F. Stone once acknowledged, "the only check upon our own exercise of power is our own sense of self-restraint."[225] Of course, self-restraint—being a variable concept—means different things to different individuals. Thus, Judge David L. Bazelon of the District of Columbia Federal Court of Appeals has remarked that his test for determining the necessity for federal intervention is: "Does it make you sick?"[226] While it is true, in attempting to practice a measure of self-restraint, that the nausea scale may be as good a test as any other, some individuals are as likely to be genuinely sickened by double-celling as others are by rat infestation and widespread violence.

Here, as in other areas over the past decade, the Supreme Court has offered little real guidance. In opining on legal intervention doctrines from comity in state court proceedings to standing in general, the Burger Court has vacillated. Hence, while it has been more sensitive to federalism principles than its predecessor, its various decisions have provided only limited direction to the lower courts.[227]

Even more problematic than federal judicial intervention—for clearly, in many cases, "tests" or no, intervention in the protection of civil rights is entirely warranted—is the form which that intervention takes. As discussed previously, invalidating a law, even ordering judicially approved changes in state and local processes and institutions where Constitutional violations have been proved are legitimate federal judicial functions. However, the propriety of federal court orders which mandate highly specific legislative and executive actions and skew state budgets away from policies deemed significant by elected officials has been questioned. In such cases, judicial intrusiveness may impinge upon three highly interrelated elements of governance: state-local prerogatives, democratic decisionmaking and fiscal integrity—factors, which combined, have long been associated with the notion of "effective government." With its renewed, if somewhat ambivalent, interest in the former two elements, the Supreme Court appears to be saying that democracy and federalism should be given some weight even in cases involving rights.[228]

The more difficult questions, however, revolve around judicial considerations of costs. Should—even *can*[229]—judges give some weight to dollars and cents in making their Constitutional rights decisions? While few if any legal scholars believe that the costs involved in remedying Constitutional violations should be the deciding factor in the fashioning of those remedies, some do argue that financial values should be given more weight than they are currently afforded.

In the first place, the cost issue is very much tied up with the issues of democratic decisionmaking and state-local rights in the federal system. Budgetary decisions are, after all, at the very heart of governance. When a judge commandeers a portion of a state's budget to one purpose—not necessarily the state's preferred purpose—he or she effectively deprives some other purpose—perhaps a preferred purpose—of funds.

Second, on a more mundane level, there is only so much money to go around. Given that neither the federal judiciary nor state and local governments can print currency, costly court orders represent a depletion of finances generally.

The Supreme Court—though, again, far from sailing a clear course—has not been adverse to weighing costs where appropriate. Hence, in a 1976 due process case, the Court framed the issue of additional costs in terms of the public interest:

> The most visible burden [of a prior evidentiary hearing] would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase.... The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administration would not be insubstantial.
>
> *Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed.* At some point the benefit of an additional safeguard to the individual affected by the administrative action and society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.[230]

Of course, a very convincing argument could be made that it is one thing to weigh costs where the issue is one of procedure in dispensing benefits and quite another where cruel and unusual punishment is being meted out in an institutional setting. Still, Constitutional rights are Constitutional rights whether they be to due process in the receipt of benefits or equal protection for malevolent forms of punishment. If costs factor into one, can they be factored into the other? Yes, according to Gerald Frug:

> A recognition that government resources are finite does not allow the government to refuse to enforce Constitutional rights because it is too expensive to do so. The issue in the institution cases is not whether there will be compliance with the Constitution—of that there should be no doubt—but rather the timing of achieving the compliance. Because of myriad demands for limited government resources, only a certain amount of money can be allocated in any particular year for a new expenditure, no matter how intense the need for it. A judicial decision that institutional conditions are unconstitutional requires that money be found to correct them, but the amount of money to be applied each year is a legislative decision; this decision must be accepted by the courts if, in the words of the desegregation cases, it is made in "good faith."[231]

To achieve this blend of Constitutional enforcement and practical flexibilty, Frug offers an example of what he believes to be a reasonable judicial course of action:

> If, for example, a court were to decide that the Constitution requires "provision of basic medical care to all patients in the institution," it could then require the state to draft a plan indicating(1) what the state will do, in the setting of the institution in question, to meet such a standard and (2) how, and over what period of time, the state will implement its plan. The court would retain the power to review and criticize the state's particularization of the constitutional standard, but agreement is likely due to widespread acceptance of what constitutes minimally adequate care. In fact, the court can avoid deciding whether the precise ingredients of the plan amount to constitutionally adequate care by treating the state's plan as provisional only. If the plan makes major improvements in presently indefensible conditions, the court need not bless that plan as constitutional. The major issue is not what has to be done to complete the job—that is a long way off—but how the job can be begun. . . . It is the direction and rate of change that is important, not the details of timing, staffing, and planning for capital construction. These details should not be the business of the courts.[232]

Judicial decisionmaking is not conducive to easy answers or pat formulas. The example proferred by Frug could not possibly fit every institutional case—in some situations far more drastic remedies might very well be appropriate. But if we are to ask our legislative and executive branches to consider more fully the costs—fiscal and federal—of their policy decisions, is it any less proper to ask that the judicial branch do so also? Judges may not think of themselves as regulators—a term normally used to describe certain agency personnel—but they are regulators and regulators of other regulators as well. They have therefore a special duty to balance their decisions. And while some factors, such as individual rights and deference to the elected branches, must always weigh in more heavily than others, those others may deserve some consideration as well.

FOOTNOTES

[1] *United States Constitution*, Art. VI.

[2] Alexander Hamilton, *Federalist* 33, 201. All references are to the Mentor Book edition, introduction by Clinton Rossiter (New York: The New American Library of World Literature, Inc., 1961).

[3] For a complete discussion of Constitutional foundations and creation see Advisory Commission on Intergovernmental Relations, *The Conditions of Contemporary Federalism: Conflicting Theories and Collapsing Constraints*, Vol. II of *The Federal Role In the Federal System: The Dynamics of Growth* (Washington, DC: U.S. Government Printing Office 1981), pp. 27–34. pp. 27–34.

[4] James Madison, *Federalist* 45, p. 293.

[5] *Gibbons v. Ogden*, 9 Wheaton 1 (1824).

[6] Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development*, 5th ed. (New York: W.W. Norton and Company, Inc., 1976), p. 277.

[7] 9 Wheaton 1 (1824).

[8] Most notably over economic matters in a number of the post-New Deal cases and over social matters in the 1964 civil right cases.

[9] The Chief Justice also took the occasion to put forth his case for broad construction of the Constitution generally.

[10] Kelly and Harbison, *The American Constitution*, p. 278.

[11] *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 Howard 299 (1851).

[12] *Ibid.*

[13] Of particular note were the Interstate Commerce Commission, established in 1887, and whose powers were virtually gutted by the Court by 1897 and the *Sherman Anti-Trust Act*, passed in 1890 but consigned to relative impotency by the Court's decision in *United States v. E.C. Knight*, 156 U.S. 1 (1895) just five years later.

[14] Edward S. Corwin, *The Constitution and What It Means Today*, 12th ed. (Princeton, NJ: Princeton University Press, 1958), p. 45.

[15] *Ibid.*

[16] Upheld by *Champion v. Ames*, 188 U.S. 321 (1903).

[17] Upheld by *Hipolite Egg Company v. United States*, 220 U.S. 45 (1911).

[18] Upheld by *Hoke v. United States*, 227 U.S. 308 (1913).

[19] An excerpt from a 1910 federal circuit court decision illustrates how far the federal "police power" had extended by the second decade of the twentieth century: "Congress has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the anti-trust statute to prevent immorality in contracts and business affairs. Congress has enacted the livestock sanitation act to prevent cruelty to animals. Congress has enacted the cattle contagious dis-

ease act to more effectively suppress and prevent the spread of contagious and infectious diseases of livestock. Congress has enacted a statute to enable the Secretary of Agricultrue to establish and maintain quarantine districts. Congress has enacted the meat inspection act. Congress has enacted the obscene literature act. Congress has enacted the lottery statute.... Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have liquors delivered c.o.d....." *Shawnee Milling Company v. Temple*, 179 Fed. 517 (1910).

[20] See for example, *Northern Secruities Company v. United States*, 193 U.S. 197 (1904) and *Swift and Company v. United States*, 196 U.S. 375 (1905).

[21] See for example, *Illinois Central Railroad v. Interstate Commerce Commission*, 206 U.S. 441 (1907), *Interstate Commerce Commission v. Illinois Central Railroad*, 215 U.S. 452 (1910), *United States v. Atchison, Topeka, and Santa Fe Railroad*, 234 U.S. 476 (1914), *Houston East and West Texas Railway*, 234 U.S. 342 (1914).

[22] Under Wilson were born such powerful federal regulatory instruments as the *Federal Reserve Act*, the Federal Trade Commission, and the *Clayton Anti-Trust Act*.

[23] *The "leap" was also notable in the areas of taxation and, to a lesser extent, spending. subjects to be addressed subsequently.*

[24] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

[25] *Duplex Printing Press Company v. Deering*, 254 U.S. 443 (1921) and *American Steel Foundries v. Tri-Cities Trade Council*, 257 U.S. 1 84 (1921).

[26] Most notably in *Schecter Poultry Corporation v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

[27] *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S 1 (1937).

[28] *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).

[29] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[30] Some would argue that the very *existence* of the commerce power, even when not explicitly used, represents, to a certain extent, an implicit preemption of state authority.

[31] *United States Constitution*, Amendment XIV, Section 1.

[32] *Plessy v. Ferguson*, 163 U.S. 537 (1890).

[33] *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).

[34] *The Slaugtherhouse Cases*, 16 Wallace 36 (1873).

[35] This was known as the doctrine of "selective incorporation" and generally was used in applying First Amendment freedoms to the states.

[36] The great drive for nearly total application began with the Warren Court's criminal procedure decisions.

[37] Due process had begun to be used in more diverse and broader ways even before the late nineteenth century. By necessity, the above description of due process has been treated very briefly and, therefore, in a vastly oversimplified manner. For a complete treatment of the subject see: A.E. Dick Howard, *The Road From Runnymede: Magna Carta and Constitutionalism In America* (Charlottesville, VA: University of Virginia Press, 1968), Chapters XVI–XIX.

[38] *Chicago, Milwaukee, and St. Paul Railway Company v. Minnesota*, 134 U.S. 418 (1890).

[39] Kelly and Harbison, *The American Constitution*, p. 473.

[40] Corwin, *The Constitution and What It Means Today*, p. 268.

[41] It should be noted, however, that unlike the 15th Amendment, the 14th Amendment makes no mention of race.

[42] *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

[43] Lewis B. Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," 79 *Columbia Law Review* 858 (1979). See also: Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954).

[44] The 17th Amendment, ratified in 1913, changed this by calling for popular Senatorial elections.

[45] *United States Constitution*, Art. I, Sec. 8.

[46] *Steward Machine Company v. Davis*, 301 U.S. 548 (1937).

[47] A notable instance of this sort was an unusually high tax put on the sale of colored oleomargarine. The tax was obviously being used to suppress the sale and manufacture of the product but was upheld by the Court nonetheless. *McCray v. United States*, 195 U.S. 27 (1904).

[48] Kaden, "Politics, Money, and State Sovereignty," p. 883.

[49] *Steward Machine Company v. Davis*, 301 U.S. 548 (1937).

[50] *id.*

[51] Kaden, "Politics, Money, and State Sovereignty," p. 884.

[52] *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947).

[53] 262 U.S. 447 (1923).

[54] *Id.*

[55] 297 U.S. 1 (1936).

[56] 330 U.S. 127 (1947).

[57] *Id.*

[58] Richard B. Cappalli, *Rights and Remedies Under Federal Grants* (Washington, DC: The Bureau of National Affairs, Inc., 1979), Chapter 6.

[59] 330 U.S. 127 (1947).

[60] *Helvering v. Davis*, 301 U.S. 619 (1937).

[61] See *Federalist* 23, 33, and 44.

[62] *McCulloch v. Maryland*, 4 Wheaton 316 (1819).

[63] *United States Constitution*, Art. I, Sec. 10.

[64] Whether the source of contract was the states directly or the states as a conduit for the people was not then satisfactorily resolved.

[65] See especially, *Federalist* 39, 45, and 46.

[66] A notable model was the Virginia Declaration of Rights. A.E. Dick Howard, "The Supreme Court and Federalism," in The Courts: *The Pendulum of Federalism*, Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 15–16, 1979 (Washington, DC: The Roscoe Pound—American Trial Lawyers Foundation, 1979), p. 74.

[67] *United States Constitution*, Amendment X.

[68] Kaden, "Politics, Money, and State Sovereignty," pp. 852–853.

[69] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[70] *United States v. Darby*, 312 U.S. 100 (1941).

[71] *Chisolm v. Georgia*, 2 Dallas 419 (1793).

[72] *United States Constitution*, Amendment XI.

[73] 209 U.S. 123 (1908).

[74] A.E. Dick Howard, *I'll See You in Court: The States and the Supreme Court* (Washington, DC: National Governors' Association Center for Policy Research, 1980), p. 13.

[75] *Hutto v. Finney*, 437 U.S. 678 (1978).

[76] See for example: *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Quern v. Jordan*, 440 U.S. 332 (1979).

[77] *Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Justice Black concurring).

[78] Laurence H. Tribe, *American Constitutional Law* (Mineola, New York: The Foundation Press, Inc., 1978), p. 315.

[79] David B. Walker, *Toward a Functioning Federalism* (Cambridge, MA: Winthrop Publishers, Inc., 1981), pp. 94–95.

[80] Tribe, *American Constitutional Law*, p. iv.

[81] For a complete description of the partial preemption technique see *Chapter 1* of this volume.

[82] *Hodel v. Virginia Surface Mining and Reclamation Association*, 49 LW 4654-4660 (June 15, 1981). (emphasis in original).

[83] *Id.*, n. 29.

[84] 426 U.S. 833 (1976). Hereafter referred to as *NLC*)

[85] 49 LW 4654 at 4660 (June 15, 1981).

[86] See for example *District of Columbia v. Train*, 521 F. 2d 971, 988 (D.C. Cir. 1975), vacated on other grounds, 431 U.S. 99 (1977).

[87] *Duquesne Light Company v. EPA*, 481 F. 2d 1 (3d Cir. 1973), 522 F. 2d 1186 (3d Cir. 1975), vacated and remanded on other grounds, 427 U.S. 902 (1976).

[88] Kaden, "Politics, Money, and State Sovereignty," p. 870.

[89] In the process of critical review, this statement sparked lively debate including the astute observation of one reviewer that "the Cubs are not an inept team; they are merely suffering from a *regulatory* decision to end the season in October rather than July!"

[90] U.S. Congress, Senate, Committee on Environment and Public Works, *The Clean Air Act In the Courts*, A Report prepared by the American Law Division, Congressional Research Service, Library of Congress, Serial No. 97–2, 97th Congress, 1st sess., April 1981 (Washington, DC: U.S. Government Printing Office, 1981), pp. 71–72.

[91] *NRDC v. EPA*, 475 F. 2d 968 (D.C. Cir. 1973).

[92] U.S. Senate, *The Clean Air Act In the Courts*, p. 72.

[93] *Pennsylvania v. EPA*, 500 F. 2d 246 (3rd Cir. 1974).

[94] *Maryland v. EPA*, 530 F. 2d 215 (4th Cir. 1975) and *Brown v. EPA*, 521 F. 2d 827 (9th Cir. 1975).

[95] U.S. Senate, *The Clean Air Act in the Courts*, p. 73.

[96] *District of Columbia v. Train*, 521 F. 2d 971 (D.C. Cir. 1975).

[97] *EPA v. Brown*, 431 U.S. 99 (1977).

[98] U.S. Senate, *The Clean Air Act In the Courts*, p. 75.

[99] *Brown v. EPA*, 566 F. 2d 566 at 671 (9th Cir. 1977).

[100] *Id.*, at 672.

[101] No. 78–3306, No. 78–3307 (6th Cir., Dec. 5, 1980). *Cert. denied* by Supreme Court.

[102] *Id.* at 17.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 18. In a stinging dissent, Judge Weick asserted, "The State should no more be required to enforce federal laws than the federal government should be required to enforce state laws. Id. at 22.

[106] David R. Woodward and Ronald M. Levin, "In Defense of Deference: Judicial Review of Agency Action," *Administrative Law Review*, Vol. 13, No. 3 (Summer 1979), 335. Internal quotation from *Zuber v. Allen*, 396 U.S. 168, 192 (1969).

[107] The majority of direct orders come from the federal courts. See the section on "Implementation in the Courts: Suing for Judicial Regulation" in this chapter.

[108] *Fitzpatrick v. Bitzer*, 44 LW 5120 (1976).

[109] 426 U.S. 833 at 845 (1976) citing *Coyle v. Smith*, 221 U.S. 559 at 565 (1911).

[110] *Id.*, at 845.

[111] *Id.*, at 833.

[112] 29 C.F.R. Section 775.3.

[113] 29 C.F.R. Section 775.3(b) (1)–(8).

[114] Cited in *Nation's Cities Weekly*, (December 14, 1981), p. 12.

[115] CA 3; *Kramer v. New Castle Area Transit Authority* (4–30–82) cited at 50 LW 2664.

[116] *San Antonio Metropolitan Transit Authority v. Donovan*, Civil Action No. SA 79 CA 457 (W.D. Tx. November 17, 1981), p. 2 of judgment. Similar litigation is in various stages of appeal in Chattanooga, Tennessee; New Castle, Delaware; Augusta, Georgia; and Tallahassee, Florida.

[117] 598 F2d 1033 (6th Cir. 1979).

[118] *Id.*, cited at 47 LW 2785. (emphasis added) The Amersbach approach was later employed by the First Circuit in declaring FLSA standards unconstitutional as applied to mass transit, rental parking lots, and collection of highway tolls in Puerto Rico. CA1; *Molina-Estrada v. Puerto Rico Highway Authority* (6–8–82) cited at 51 CW 2006.

[119] 50 LW 4315 (1982).

[120] 426 U.S. 833 at fn 18.

[121] USDC SMiss; *Mississippi v. Federal Energy Regulatory Commission* (2+19+81) cited at 49 LW 2554.

[122] 50 LW 4566 (1982).

[123] Contested portions of the act were Titles I and III which compel (direct order) states to *consider* the use of six approaches in structuring utility rates and thereafter report and explain the results of their consideration to the Secretary of Energy and Section 210 which requires the states to implement (partial preemption) certain federal rules encouraging cogeneration and small power production facilities.

[124] 50 LW 4566 (1982).

[125] Justice O'Connor dissenting in *Id.*

[126] 426 U.S. 833 at 851.

[127] *Id.*, at 852.

[128] *Id.* at 851.

[129] *Id.* at 852 no. 17.

[130] *King v. Smith*, 392 U.S. 309 (1968); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *Berman v. Parker*, 348 U.S. 17 (1954); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947); *United States v. City of Milwaukee*, 441 F. Supp. 1377 (D. Wisc. 1977); *Stiner v. Califano*, 438 F. Supp. 1314 (D. D.C. 1976); *Dupler v. City of Portland*, 421 F. Supp. 1314 (D. ME. 1976); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S.C. 1974); *Barber v. White*, 351 F. Supp. 1091 (D. Conn. 1972); *Williford v. Laupheimer*, 311 F. Supp. 720 (E.D. Pa. 1969); *United States v. Frazer*, 297 F. Supp. 319 (M.D. Ala. 1968). If Congress *explicitly* acts under one of its powers—for example the spending power—the Court may not be inclined to test the legitimacy of a "string" under another unmentioned power, such as the Fourteenth Amendment. See for example: *Pennhurst State School and Hospital v. Halderman*, 49 LW 4363 (April 29, 1981).

[131] *Massachusetts v. Mellon*, 262 U.S. 447 (1923) and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[132] Richard B. Cappalli, *Rights and Remedies Under Federal Grants* (Washington, DC: The Bureau of National Affairs, Inc., 1979), p. 177.

[133] *Ibid.*, p. 225. See for example, *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966): "The word 'person' in the context of the Due Process Clause of

the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge has never been done by any Court."

[134] Unfortunately, grants have been a little studied area of the law and thus relatively few treatments of grant law per se have been completed. Nonetheless, filling the void, several excellent treatments of various aspects of grant law do exist. See especially: Richard B. Cappalli, *Rights and Remedies Under Federal Grants* (Washington, D.C.: Bureau of National Affairs, Inc., 1979); Thomas J. Madden, "The Law of Federal Grants," in *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, Advisory Commission on Intergovernmental Relations, ed., M–122 (Washington, DC: U.S. Government Printing Office, 1980), pp.9–25; George D. Brown, "The Courts and Grant Reform: A Time for Action," *Intergovernmental Perspective*, Fall 1981, pp. 6–14; and Thomas J. Madden, "The Right to Receive Federal Grants and Assistance," 37 *Federal Bar Journal* 17 (1978).

[135] *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

[136] *Named Individuals of the San Antonio Conservation Society v. Texas Highway Department*, 446 F. 2d 1013 at 1028 (5th Cir. 1971). (emphasis added)

[137] *Macon v. Marshall*, 439 F. Supp. 1209 at 1217 (M.D. Ga. 1977). (emphasis added)

[138] *North Carolina v. Califano*, 445 F. Supp. 532 at 535, 536 (E.D.N.C. 1977) *aff'd* 435 U.S. 962, 98 S. Ct. 1597 (1978). (emphasis added)

[139] *Steward Machine Company v. Davis*, 301 U.S. 548 at 590 (1937).

[140] A.E. Dick Howard, "Judicial Federalism: The States and the Supreme Court," in *American Federalism: A New Partnership for the Republic*, Robert C. Hawkins ed., (San Francisco: Institute for Contemporary Studies, 1982), p. 220.

[141] Cappalli, *Rights and Remedies Under Federal Grants*, pp. 177–78.,

[142] In the first section we discussed how the inducement versus coercion standard first evolved in cases regarding conditions attached to credits against federal taxes.

[143] PL 91–373, 84 Stat. 697.

[144] PL 94–566, 90 Stat. 2667.

[145] Charles S. Rhyne, et al, *Federal Grant Conditions*, 1979 Seminar Workpaper prepared for the 1979 NIMLO Mid-year Seminar, Washington, DC, March 25–27, 1979, p. 93.

[146] *Ibid.*, p. 95.

[147] *Los Angeles County v. Marshall*, 631 F. 2d 767 (D.C. Cir.), *cert. denied*, 101 S. Ct. 113 (1980).

[148] A.E. Dick Howard, Speech before the Federalism Conference sponsored by the Institute for Contemporary Studies, Washington, DC, September 9, 1981.

[149] The crosscutting device can actually be traced as far back as *The Hatch Act* which reads in relevant part, "any activity which is financed in whole or part by loans or grants . . ." (Section 12) 54 Stat. 767 (1940), S U.S.C. 1501(4).

[150] President John F. Kennedy responding to a question at the annual convention of the American Society of Newspaper Editors, April 17, 1963, from the Papers of Theodore M. Hesburgh, Civil Rights Collection, University of Notre Dame, Doc. No. 6274, cited in Edward McGlynn Gaffney, Jr., "An Overview of the Growth of Federal Regulation By Means of Conditioned Financial Assistance," paper prepared for delivery to a conference sponsored by the Center for Constitutional Studies and the White Center on Law and Public Policy, Notre Dame Law School, Washington, DC, March 12, 1981, p. 18.

[151] Gaffney, "An Overview," pp. 19–20.

[152] *Ibid.*, p. 19.

[153] Special Message to Congress by President Kennedy, June 19, 1963 as cited in *Ibid.*

[154] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[155] *The Civil Rights Act of 1964*, P.L. 88–352, Title VI, Section 601, 78 Stat. 240, 42 U.S.C. Section 2000d reads: "No person in the United States shall, on the ground of race, color, or national origin, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*" *The Education Amendments of 1972*, P.L. 92–318, Title IX, Section 901(A), 86 Stat. 373, 20 U.S.C. 1681 reads: "No person in the United States shall, on the basis of sex, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.* The Age Discrimination Act of 1975, P.L. 94–135, Section 303, 89 Stat. 728, 42 U.S.C. 6102 reads: ". . . no person in the United States shall, on the basis of age, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.*" *The Vocational Rehabilitation Act of 1973*, P.L. 93–112, Title V, Section 504, 87 Stat. 361, 29 U.S.C. 794 reads: "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*

[156] See for example *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) in which the Court ruled that Section 504 does not necessarily impose affirmative action obligations on recipients of federal funding.

[157] "The Federal Conditional Spending Power: A Search for Limits," *Northwestern University Law Review*, Volume 70, No. 2 (May–June 1975), 309.

[158] *Ibid.*

[159] See for example: *Highway Beautification Act of 1965* (23 U.S.C. 131), *National Health Planning and Resource Development Act of 1974* (42 U.S.C. 300m(d)), *Federal Aid Highway Amendments of 1974* (23 U.S.C. 154), *Education of All Handicapped Children Act of 1975* (20 U.S.C. 1416), and *Clean Air Act Amendments of 1977* (42 U.S.C. 7506(c) and 7616).

[160] Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," pp. 881–883.

[161] *Montgomery County v. Califano*, 449 F. Supp. 1230 at 1247 (D. Md. 1978).

[162] *North Carolina v. Califano*, 445 F. Supp. S32 (E.D.N.C. 1977), *aff'd* 435 U.S. 962, 985. Ct. 1597 (1978).

[163] 49 LW 2822 (D.C. Cir. June 18, 1981).

[164] *Id.*

[165] *Pennhurst State School and Hospital v. Halderman*, 49 LW 4363 at 4367 (April 29, 1981).

[166] George D. Brown, "Grant Law and Grant Reform: The Role of the Courts in Federal Financial Assistance Programs," *Intergovernmental Perspective*, Vol. 7, No. 4 (Fall 1981), p. 8.

[167] 49 LW 4363 at 4369.

[168] Brown, "Grant Law and Grant Reform," p. 8.

[169] 49 LW 4363 at 4367, n. 13.

[170] Brown, "Grant Law and Grant Reform," p. 8.

[171] 347 U.S. 483 (1954).

[172] "Developments in the Law: Section 1983," *Harvard Law Review* 90 (1977) 1133, cited in Neil D. McFeeley, "The Supreme Court and the Federal System: Federalism From Warren to Burger," *Publius* (Fall 1978), 7.

[173] The now near universally conceded necessity for a federal solution of some sort to end segregation and the almost complete lack of costs involved in civil liberties decisions warrants the omission of those cases from this brief discussion.

[174] McFeeley, "The Supreme Court and the Federal System," p. 14. In fairness, many would contest the author's use of the word "rush" while agreeing with his basic thrust. Whatever ill effects may have resulted, the Court was, after all, responding to a long and well-documented history of policy misconduct.

[175] 351 U.S. 12 (1956).

[176] 372 U.S. 353 (1963).

[177] 97 S. Ct. 1491 (1977).

[178] Gerald E. Frug, "The Judicial Power of the Purse," 126 *University of Pennsylvania Law Review* 715 (1978), 761–62.

[179] Phillip B. Kurland, *Politics, the Constitution, and the Warren Court* (Chicago: University of Chicago Press, 1970), p. 82.

[180] Kaden, "Politics, Money, and State Sovereignty," pp. 860–61.

[181] Kurland, *Politics, the Constitution, and the Warren Court*, p. 84.

[182] As of 1978, the major prison cases included: *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *affid in part, remanded in part sub nom. Newman v. Alabama*, 559 F. 2d 283 (5th Cir. 1977); *Newman v. Alabama*, 348 F. Supp. 278 (M.D. Ala. 1972), *affid in part, decision reserved in part*, 503 F. 2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976); *Holt v. Hutto*, 363 F Supp. 194 (E.D. Ark. 1973), *affid in part, rev'd in part sub nom. Finney v. Arkansas Board of Corrections*, 505 F. 2d 194 (8th Cir. 1974); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F. 2d 304 (8th Cir. 1971); *Anderson v. Redman*, 429 F. Supp. 1105 (D. Del. 1977); *Costello v. Wainright*, 397 F. Supp. 20 (M.D. Fla. 1975), *vacated on other grounds*, 539 F. 2d 547 (5th Cir. 1976) (en banc), *rev'd and remanded* 430 U.S. 325 (1977); *Williams v. Edwards*, 547 F. 2d 1206 (5th Cir, 1977); *Bell v. Hall*, 392 F. Supp. 274 (D. Mass. 1975); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 407 F. Supp. 1117 (N.D. Miss. 1975), 423 F. Supp. 732 (N.D. Miss. 1976), *aff'd.*, 548 F. 2d 1241 (5th Cir. 1977); *Leaman v. Helgemoe*, 437 F. Supp. 269 (D. N.H. 1977); *Nadeau v. Helgemoe*, 423 F. Supp. 1250 (D.N.H. 1976); *Todaro v. Ward*, 431 F. Supp. 1129 (S.D.N.Y. 1977), *aff'd*, 565 F. 2d 48 (2d Cir. 1977); *Chapman v. Rhodes*,* 434 F. Supp. 1007 (S.D. Ohio 1977); and *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), *aff'd*, 564 F. 2d 388 (10th Cir. 1977). Source: Burg, "The Judicial Power of the Purse," p. 718.*—Since this list was compiled, the *Chapman* case has gone to the Supreme Court and will be discussed subsequently.

[183] Though no one knows how many local jails are under court order, as of 1978, a partial listing included: *Dillard v. Pitchess*, 399 F. Supp. 1225 (C.D. Cal. 1975); *Brennemen v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 172); *Inmates of Henry Country Jail v. Parham*, 430 F. Supp. 304 (N.D. Ga. 1976); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972); *O'Bryan v. County of Saginaw*, 437 F. Supp. 582 (E.D. Mich. 1977); *Aherns v. Thomas*, 434 F. Supp. 873 (W.D. Mo. 1977); *Goldsby v. Carnes*, 365 F. Supp. 395 (W.D. Mo. 1973); *Moore v. Janing*, 427 F. Supp. 567 (D. Neb. 1976); *Smith v. Sullivan*, 553 F. 2d 373 (5th Cir. 1977); *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *aff'd in part*, 499 F. 2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971), 358 F. Supp. 338, 361 F. Supp. 1235 (E.D. Ark. 1973); *Mitchell v. Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976); *Miller v. Carson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part, modified in part*, and *remanded*, 563 F. 2d 741 (5th Cir. 1977); *Hamilton v. Landrieu*, 351 F. Supp. 549 (E.D. La. (1972); *Hamilton v. Shiro*, 338 F. Supp. 1016 (E.D. La. 1979); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F. 2d 1196 (1st Cir. 1974); *Obadde v. McAdory* (S.D. Miss. 1973), reported at 2 *Prison L. Rep.* 413 (1973); *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F. 2d 392 (2d Circ. 1975); *Rhem. v. Malcolm*, 371 F. Supp. 594, 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd.* 507 F. 2d 333 (2d Cir. 1974), 389 F. Supp. 964 (S.D.N.Y. 1977); and *Jones v. Wittenberg*, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F. 2d 854 (6th Cir. 1972). Source: *Ibid.*, pp. 718–79.

[184] As of 1978: *Wyatt v. Stickney*, 344 F. Sup. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *affid in part, remanded in part, decision reversed in part sub nom. Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Burnham v. Department of Public Health*, 503 F. 2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1977); *Gauthier v. Benson* (D. Mass. 1976), reported at 1 *Mental Disability L. Rep.* 122 (1976); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated and remanded in part*, 550 F. 2d 1122 (8th Cir. 1977); *Doe v. Hudspeth* (S.D. Miss 1977), reported at [1977] 11 *Clearinghous Rev.* 160; *Horachek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973); *New York State Association for Retarded Children, Inc. v. Carey*, 393 F. Supp.715 (E.D.N.Y. 1975), 409 F. Supp. 606 (E.D.N.Y. 1976); *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Halderman v. Pennhurst State School and Hospital*,* *No. 74–1345* (E.D. Pa., filed Nov. 30, 1977); and *Saville v. Treadway*, 494 F. Supp. 430 (M.D. Tenn. 1974).
Source: *Ibid.* **Pennhurst* has since been decided by the Supreme Court and will be discussed subsequently, as well as in the previous text on the conditional spending power.

[185] As of 1978: *Nelson v. Hayne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F. 2d 352 (7th Cir. 1974); *Baker v. Hamilton*, (W.D. Ky. 1972), reported at [1972] 6 *Clearinghous Rev.* 100, *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Patterson v. Hopkins*, 360 F. Supp. 676 (N.D. Miss. 1972), *aff'd*, 481 F. 2d 640 (5th Cir. 1973); *Pena v. New York State Division for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976); *Matarella v. Kelly*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Lollis v. New York State Department of Social Services*, 332 F. Supp. 473 (S.D.N.Y. 1970), 328 F. Supp. 1115 (S.D.N.Y. 1971); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); and *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F. 2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977). Source: *Ibid.*, p. 719.

[186] For more indepth treatment of some individual cases see: U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice, *After Decision:*

Implementation of Judicial Decrees In Correctional Settings (Washington, DC: U.S. Government Printing Office, 1977).

[187] Charles Fried, "Curbing the Judiciary," *New York Times*, Nov. 10, 1981, p. A23.

[188] 49 LW 4363.

[189] *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F. 2d 304 (8th Cir. 1971) as cited in Frug, "The Judicial Power of the Purse," p. 726. (emphasis added)

[190] American Civil Liberties Union, *The Alabama Prison System* cited in *Criminal Justice Newsletter*, Vol. 8, No. 8 (April 11, 1977), 6.

[191] Frug, "The Judicial Power of the Purse," pp. 735–36.

[192] Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977), p. 7.

[193] Archibald Cox, *The Role of the Supreme Court in American Government* (London: Oxford University Press, 1976), pp. 95–96.

[194] Frug, "The Judicial Power of the Purse," pp. 741, 742, 733.

[195] 49 LW 4677 (June 15, 1981).

[196] 49 LW 4363 (April 20, 1981).

[197] 49 LW 4677 at 4679 (1981).

[198] *Id.*, at 4677.

[199] *Id.*, at 4680, n. 17: "Examples of recent federal court decisions holding prison conditions to be violative of the Eighth and 14th Amendments include.... *Pugh v. Locke*, 406 F. Supp. 318 (MD Ala, 1976), *aff'd as modified*, 559 F. 2d 283 (CA5 1977), *rev'd in part on other grounds* 438 U.S. 781 (1978) (per curiam).

[200] *Pugh v. Locke*, 406 F. Sup. at 329.

[201] *Id.*, at 329.

[202] *Id.*, at 323.

[203] *Id.*, at 323.

[204] *Id.*, at 323.

[205] *Id.*, at 323.

[206] *Id.*, at 327.

[207] 49 LW 4677 at 4680. (emphasis added).

[208] *Id.*

[209] Supreme Court citing the decision of the District Court, 446 F. Supp. at 1314–1322 (E.D. PA. 1977) in 49 LW 4363 at 4365.

[210] *Garrity v. Gallen*, 50 LW 2149 at 2150 (D. NH, August 17, 1981). (emphasis added)

[211] *Younger v. Harris*, 401 U.S. 37, 44–45 (1971). (Justice Black)

[212] *The Economist*, May 19, 1952, 370.

[213] *National League of Cities v. Usery*, 426 U.S. 833 (1976). (Justice Brennan dissenting)

[214] Mishkin, "Some Further Last Words on Erie: The Thread," 87 *Harvard Law Review* 1685 (1974) cited in Frug, "The Judicial Power of the Purse," 785.

[215] Lewis B. Kaden, "Federalism In the Courts: Agenda for the 1980s," in Advisory Commission on Intergovernmental Relations, *The Future of Federalism in the 1980s*, Reports and papers from the Conference on the Future of Federalism, Washington, DC, July 1981 (Washington, DC: U.S. Government Printing Office, 1981), p. 97.

[216] Oliver Wendell Holmes, "Law and the Court," in *Collected Legal Papers* (New York, 1921), pp. 295–96 cited in Howard, "Judicial Federalism: The States and the Supreme Court," p. 1.

[217] Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954) cited in *Ibid.*, p. 2.

[218] Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," p. 849.

[219] Howard, "Judicial Federalism," pp. 5–6.

[220] Kaden, "Politics, Money and State Sovereignty," p. 890.

[221] *Ibid.*, p. 889.

[222] A.E. Dick Howard, "A Litigation Society?" in *The Wilson Quarterly* (Summer 1981), p. 197.

[223] *McRedmond v. Wilson*, 533 F. 2d 757, 766 (2d Cir. 1976) (Judge Van Graafeiland, dissenting).

[224] Henry J. Friendly, *Federal Jurisdiction: A General View* (New York, 1973), p. 90 cited in Howard, "Judicial Federalism," p. 9.

[225] Justice Stone quoted in Howard, "Litigation Society?" p. 104.

[226] Judge Bazelon quoted in *Ibid.*

[227] For various perspectives on the Burger Court and federalism see: Terrance Sandalow, "Federalism and Social Change," 43 *Law and Contemporary Problems* 29 (1980) and Henry P. Monaghan, "The Burger Court and 'Our Federalism'," 43 *Id.* 39 (1980).

[228] See for example *Warth v. Seldin* 422 U.S. 490 (1975), democratic processes and *Rizzo v. Goode*, 423 U.S. 362 (1976), federalism.

[229] For example, based on a number of case studies, Donald Horowitz has come to the conclusion "that the judicial process is a poor format for the weighting of alternatives and the calculation of costs." Horowitz, *The Courts and Social Policy*, p. 257.

[230] *Mathews v. Eldridge*, 424 U.S. 319 at 347–48 (1976) (emphasis added) cited in Frug, "The Judicial Power of the Purse," pp. 775–76.

[231] Frug, "The Judicial Power of the Purse," p. 788.

[232] Frug, "The Judicial Power of the Purse," p. 790–91.

Chapter 3

The Legislative Origins of Federal Intergovernmental Regulation

> *I do not for a moment claim immunity from the mandate fever of the 1970s. As a member of Congress, I voted for many [mandates]. . . . The bills I voted for in Washington came to the House floor in a form that compelled approval. After all, who can vote against clean air and water, or better access and education for the handicapped?*[1]

Chapters 1 and 2 have documented the unprecedented growth of intergovernmental regulatory programs since 1960 and have described the legal context that nurtured it. This chapter explores the political dynamics of regulatory growth so that reform proposals can be tailored to the underlying causes of regulatory expansion. Although the diversity of new forms of intergovernmental regulation tends to obscure the sources of this growth, insights can be gained from two research perspectives. It is helpful, first, to examine the increasing use of all forms of regulation as instruments of federal intervention, in contrast to traditional reliance on incentive-based approaches. The growth of *intergovernmental* regulation occurred within this broader regulatory context, entailing either federal intervention in the internal processes of state and local governments or federal direction of the ways these jurisdictions regulate the private sector. The second research perspective examines more closely the circumstances surrounding the proliferation of the four specific techniques of intergovernmental regulation set forth in *Chapter 1* (crosscutting requirements, crossover sanctions, partial preemptions, and direct orders).

Accordingly, this chapter begins by placing the recent growth of intergovernmental regulation into historical and political perspective. Past periods of regulatory expansion and the factors contributing to the broad proliferation of federal regulation in the 1960s and 70s are reviewed briefly. The legislative histories of programs utilizing the four techniques of intergovernmental regulation are then probed and the circumstances leading to the initial formulation and adoption of each device are explored. Finally, several generalizations regarding the spread of federal mandates are advanced.

CONTINUITY AND CHANGE IN REGULATORY FORMULATION

Recent growth in the scope and numbers of federal regulations is not a wholly new phenomenon but represents a long term trend in the development of public policy in America. As Murray Weidenbaum has observed:

> The present trends in federal government regulation in the United States do not represent an abrupt departure from an idealized free market economy but rather the rapid intensification of the long term expansion of government influence over the private sector.[2]

This trend is evident in *Graph 3-1*, which shows the proliferation of federal regulatory agencies between 1900 and 1980. According to the Center for the Study of American Business, the number of regulatory agencies increased from six in 1900 to 56 by 1980.[3] Twenty new agencies were created in the 1970s alone, including the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration.[4]

Such data help to put the recent growth of federal regulation into historical perspective. However, the continuities apparent in the long term growth of regulation conceal important changes in the targets and procedures of federal requirements. The frequent use of federal mandates imposed on state and local governments, after all, is a relatively new phenomenon. Moreover, the growth of federal regulation has been marked by intermittent bursts of regulatory activism rather than uniform accretion over time. As Bardach and Kagan put it:

> The growth of regulation is not merely a product of the steady and relentless forces of logic and political and economic interests. Regulatory victories, as well as initiatives, are products of intermittent events ... that fire the political imagination and overwhelm the normal defenses of antiregulatory interests.[5]

Graph 3-2 depicts the number of major regulatory statutes passed in each decade since 1900. It indicates three clearly identifiable peaks of regulatory activism associated with the three broad periods of political reform in the 20th century: the Progressive Era, the New Deal, and the post-1960 period. In each period, a burst of regulatory legislation thrust the national government into new and previously untouched areas of public policy.

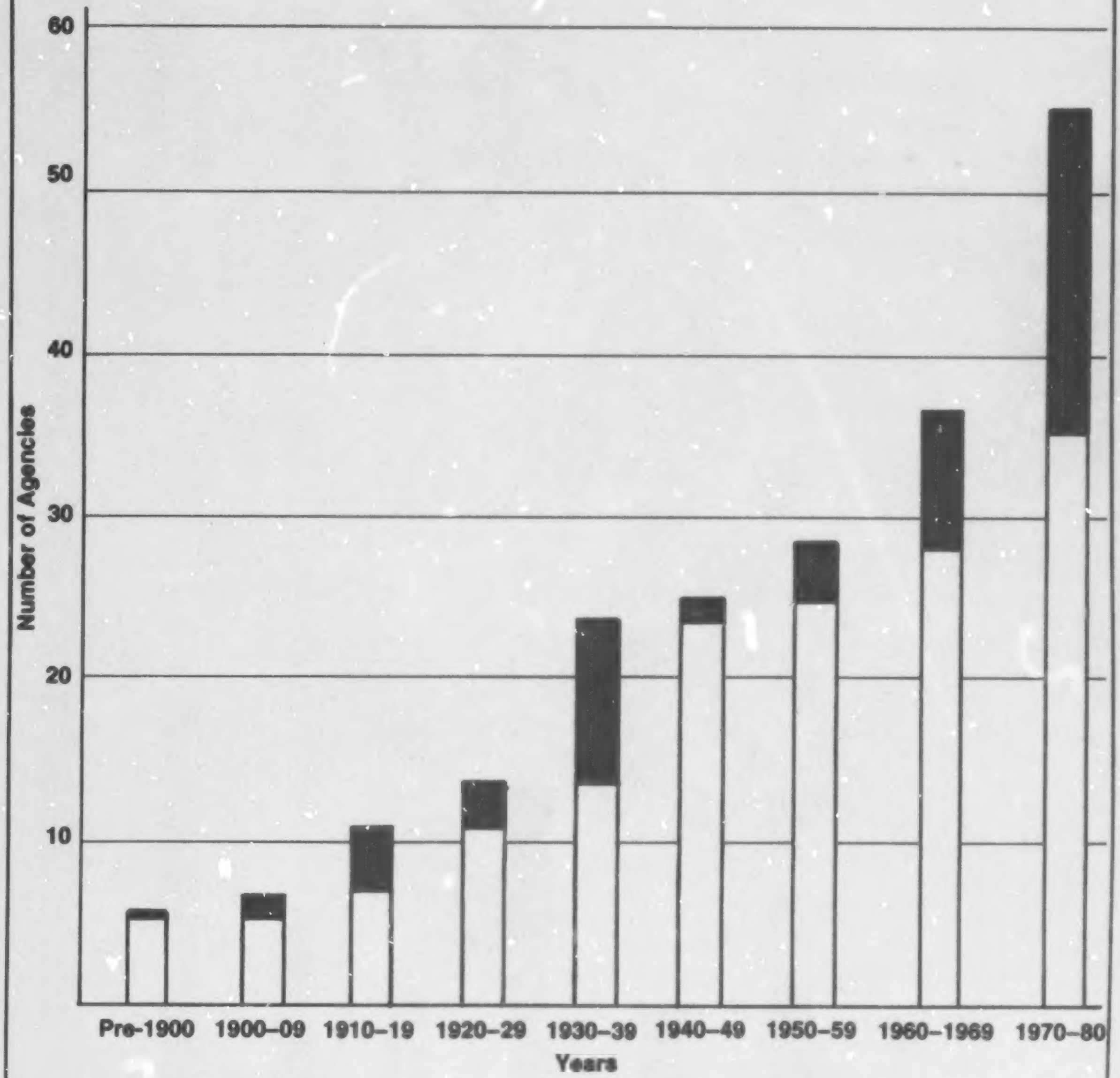
Periods of Regulatory Activism

A closer examination of these three historical periods reveals further patterns of continuity and change in the sources of regulation over time. Each of the three periods had certain political features in common. Each produced a flourish of regulatory activity as part of a broad wave of federal reform. Such activism generally was accompanied by considerable popular and even bipartisan support. Innovative use of new communications media also played a crucial role in each period. Muckraking journalism encouraged new regulatory programs during the Progressive Era; radio brought Roosevelt's voice to millions during the New Deal; and graphic television coverage of contemporary events has been associated with numerous consumer, environmental and civil rights regulations of the 60s and 70s.

Equally significant were the political differ-

Graph 3–1

Growth of Regulatory Agencies

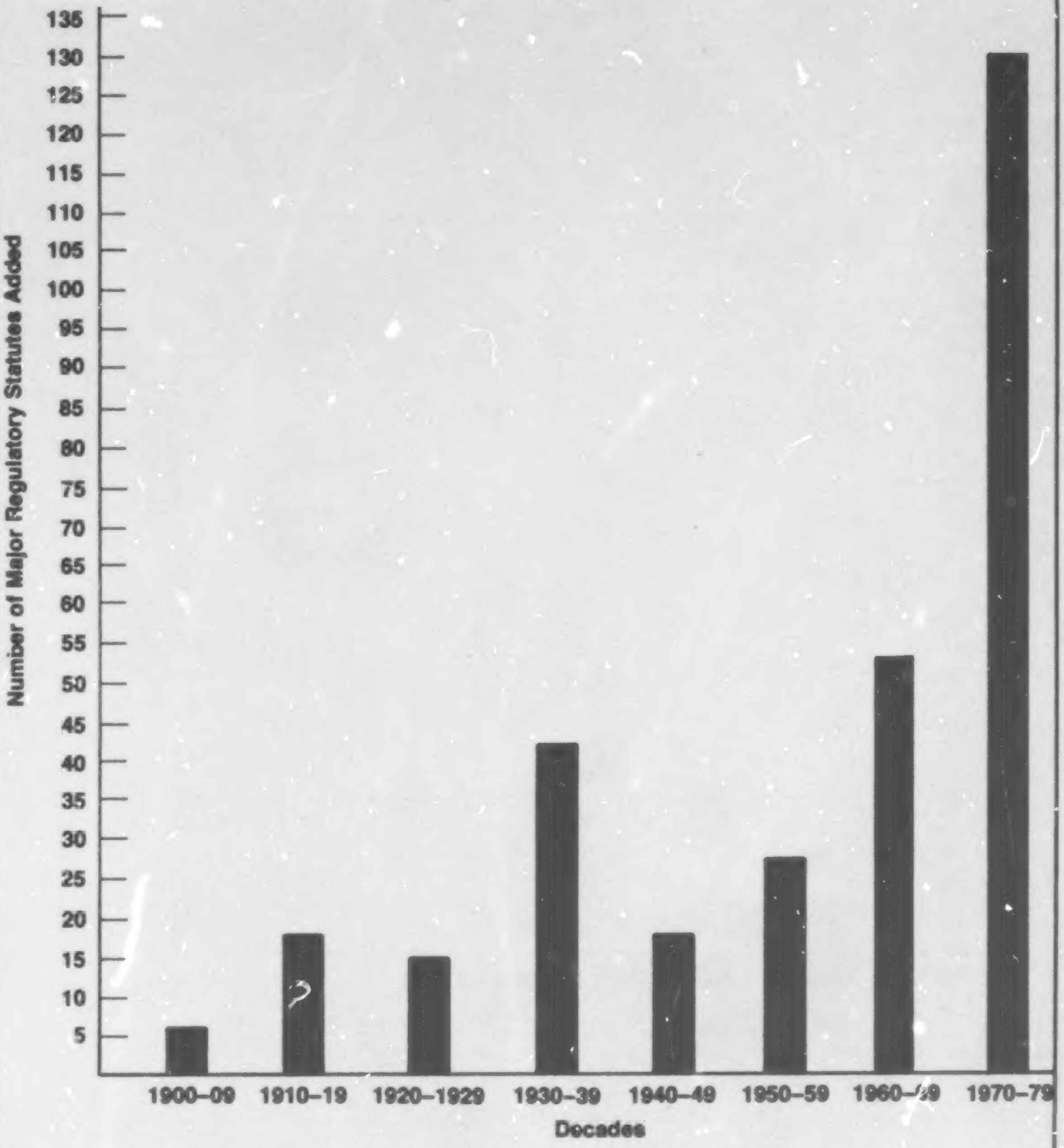


Source: Center for the Study of American Business, *Directory of Federal Agencies*, 3rd ed. (St. Louis: Center for the Study of American Business, 1981), p. 3.

Note: The darkened portions of each bar indicate the number of new regulatory agencies added in each decade.

Graph 3–2

A Decade-by-Decade Comparison of Major Regulatory Adoptions



Source: Center for the Study of American Business, *Directory of Federal Agencies*, 3rd ed. (St. Louis: Center for the Study of American Business, 1981), p. 13.

Figure 3–1

Selected Regulatory Enactments Of the Progressive Era

Date of Enactment	Title of Legislation	Subject of Regulation
1887	*Interstate Commerce Act*	railroad rates
1890	*Sherman Antitrust Act*	anti-trust
1902	*Newlands Reclamation Act*	irrigation and reclamation
1906	*Pure Food and Drugs Act*	food and drug purity
1906	*Hepburn Act*	railroad rates
1913	*Federal Reserve Act*	banking and finance
1913	*Clayton Act*	anti-trust
1914	*Federal Trade Commission Act*	anti-trust and unfair business practices
1920	*Federal Power Commission Act*	public utilities

Source: Based upon Thomas K. McCraw, "Regulatory Change, 1960–79, in Historical Perspective," in U.S. Congress, Joint Economic Committee, *Government Regulation: Achieving Social and Economic Balance*, vol. 5, *Special Study on Economic Change*, Joint Committee Print, 96th Cong., 2d sess. (1980), p. 9.

ences among the different periods, especially between the first two eras and the post-1960 period. Regulatory expansion during the Progressive Era and the New Deal was largely the product of an active Presidency and, as *Figures 3–1* and *3–2* demonstrate, regulation in both periods focused primarily on economic practices in the private sector. Moreover, earlier regulatory,programs relied almost entirely on a single institutional form—the independent regulatory commission.

In contrast, regulations in the contemporary period have frequently been Congressional initiatives, emphasizing social as well as economic goals. The scope of federal regulation extended into new program areas like civil rights, consumer protection, the environment, occupational safety and energy conservation. Included in this outpouring were a host of non-intergovernmental regulatory measures, including truth-in-lending, fair packaging and labelling, transportation safety, fair housing and equal employment. More importantly for this study, other new requirements extended their reach beyond the private sector through an array of new and intrusive mechanisms of intergovernmental regulation, ranging from partial preemptions like clean air to crossover sanctions in health planning. The list of 34 prominent intergovernmental statutes in *Chapter 1* amply testifies to the scope of this development.

The following section reviews several factors associated with the burst of all forms of regulation in the post-1960 era. Following that, the circumstances surrounding the development of intergovernmental regulation are explored.

Factors Contributing to Regulatory Growth Since 1960

The exact causes of the proliferation of regulation programs in the 1960s and 70s are ambiguous and subject to considerable debate. On the surface, these programs were enacted simply to redress a variety of social and economic problems. Yet many of these problems, ranging from the environment to civil rights, existed long before federal regulations were adopted. For the purpose of regulatory reform, it is necessary to consider why regulatory approaches were selected so frequently in this period to address these issues. Such an examination helps illuminate the underlying sources of federal regulatory growth generally and to establish the political context in which the development of intergovernmental regulation took place.

Political factors contributing to the character and climate of contemporary regulatory expansion fall into two basic categories. The first set consists of political incentives that encouraged federal policymakers to select regulatory solutions to social problems. Such incentives included expressions of popular support for the goals of federal regulation, the rise of new forms of intrest groups committed to regulatory activism, and the increasing tendency of federal budgetary constraints to discourage incentive-oriented approaches to problem solving. The second covers changes in the structure and operations of American governmental institutions—especially in the U.S. Congress—that have served to heighten governmental responsiveness to these regulatory incentives.

POLITICAL INCENTIVES

Public Opinion

A series of political incentives developed in the post-1960 period that appeared to make regulatory programs increasingly attractive to political decisionmakers. One of these was fa-

Figure 3–2

Selected Regulatory Enactments
Of the New Deal

Date of Enactment	Title of Legislation	Subject of Regulation
1933	*Agriculture Adjustment Act*	agricultural production
1933	*Tennessee Valley Authority Act*	electric power
1933	*Securities Act*	stocks and bonds
1933	*Glass-Steagall Banking Act*	banking, insurance
1934	*Securities and Exchange Act*	stock exchange
1934	*Communications Act*	radio and telegraphic communications
1935	*Motor Carrier Act*	trucking rates
1935	*Wagner Act*	labor relations
1935	*Public Utility Holding Company Act*	anti-trust
1935	*Rural Electrification Act*	electric power
1938	*Civil Aeronautics Act*	air transportation

Source: Based upon Thomas K. McCraw, "Regulatory Change, 1960–79, in Historical Perspective," in U.S. Congress, Joint Economic Committee, *Government Regulation: Achieving Social and Economic Balance*, vol. 5, *Special Study on Economic Change*, Joint Committee Print, 96th Cong., 2d sess. (1980), p. 9.

vorable public opinion. Strong public support for the landmark civil rights legislation of the 1960s has been clearly documented.[6] Similarly, public response to Earth Day, the environmental "teach-in" of April 1970 modeled after the anti-war teach-ins of the 1960s, was enormous and nationwide in scope. According to one poll expert:

> A miracle of public opinion has been the unprecedented speed and urgency with which the ecological issues have burst into the American consciousness. Alarm about the environment sprang from nowhere to major proportions in a few short years.[7]

In fact, the general goals of most regulatory programs enacted in this period appeared to draw substantial political backing from the populace-at-large.

Some observers emphasize the role of crises and other seminal events in arousing popular support for regulation. Bardach and Kagan, for example, stress that "catastrophies" like the Santa Barbara oil spill in 1969 "are probably the most important catalysts of new regulation" because they "create a more receptive climate for increased regulation and weaken the defenses . . . of those who would oppose increased regulation."[8] Consequently, there has been scholarly debate about whether a reservoir of favorable public opinion existed prior to such events or whether opinion was largely stimulated by positive media attention. In the civil rights movement, newspaper photographs and television film of the confrontation between the Birmingham police force and peaceful demonstrators under the leadership of Martin Luther King, Jr., helped generate support for legislation both in the country as a whole and in Congress. Similar observations have been made concerning Earth Day and the environmental movement. Cynics have charged that these successes spawned a new political strategy of staging "media events" in this period.

In many cases, however, public support for regulatory goals appears to have been stable and long lasting. Occupational safety regulation has shown consistent popularity in polls over time, and OSHA's passage was not associated with any worker safety crisis or wave of public sentiment. James Q. Wilson notes that the adoption of many other regulations also lacked this stimulus, and he suggests that even when a crisis does occur, it may simply tap "latent public sentiment."[9] From this perspective, the environmental movement had its roots, not only in dramatic oil spills, but in longer-term concerns raised by growing use of pesticides, pollution of the Great Lakes, and other gradually accumulating evidence of environmental degradation. Regardless of its source, however, the existence of broad public support for abstract regulatory goals represented a powerful incentive for political entrepreneurs and vote-seeking Congressmen to sponsor or to back popular legislation.

Evolving Group Influence

Interest group support for regulatory goals and programs comprised another political incentive favoring the enactment or expansion of regulatory programs. Although interest groups traditionally have been recognized as important actors in the American policymaking process,[10] some might not suspect their contribution to the sudden regulatory expansion of the 1960s and 70s. In many fields, industry and business associations dominate the landscape of interest groups, and they have hardly been responsible for unprecedented growth in federal regulation. Moreover, an ACIR analysis of federal government expansion in the post-War era concluded that, overall, interest group pressures were a secondary source of modern governmental growth. This study found that interest groups were not the ubiquitous initiating force behind new federal programs but were frequently formed as a result of them.[11]

Nevertheless, two developments affecting interest group politics in this era bolstered their support for new federal regulatory programs. First, in many fields, the growth of regulations followed on the heels of expanding federal grant programs. This pattern was apparent in areas ranging from environmental programs and handicapped requirements to health planning regulations. To the extent that these prior grant programs spawned a structure of supportive interest groups, a reservoir of advocates was created for the subsequent initation or expansion of regulatory programs.

Secondly, the political structure of interest group formation underwent a transformation in the 1960s and 70s. In the past, interest groups could only be sustained if they had a mass membership or business sponsorship. In contrast, many of today's "public interest" lobbies survive on foundation and governmental grants and volunteer support. Although populistic in character and rhetoric, some have very small memberships. Others have developed large followings through the use of computerized direct-mail fundraising drives.[12] Neither form tends to represent old-style economic interests of business, labor, or agriculture. Yet, such groups have had major influence on the environmental, consumer and safety regulations of the contemporary era.

Budgetary Constraints

Popular support and interest group activity on behalf of regulation may be viewed as positive incentives for governmental action. By the 1970s, however, an additional "negative" incentive was operating on behalf of regulation. As federal expenditures and budget deficits grew after the 1960s, regulation appeared to be an increasingly attractive policy option to national decisionmakers. As one observer wrote in 1976:

> Congressmen see themselves as having been elected to legislate. Confronted with a problem and a showing that other levels of government are "defaulting," their strong tendency is to pass a law. Ten years ago, money was Washington's antidote for problems. Now, the new fiscal realities—inflation, high unemployment and huge budget deficits—mean that Congress provides fewer dollars. Still determined to legislate against problems, Congress uses sticks instead of carrots.[13]

Available evidence appears to support this contention. Many of the biggest spending programs established in recent years were enacted in the 1960s and early 70s. Given the heady activism of the times, a number of important intergovernmental regulations were also passed. The relative proportion of new regulatory enactments went up sharply in the 1970s, however, as fiscal constraints reduced the influx of spending initiatives while regulations continued their rapid increase until late in the

Table 3–1

Spending versus Nonspending Presidential Initiatives

	Spending Programs		Nonspending Programs		Non-Spending Programs as Percentage of Total Programs	First-year Costs (billions of dollars)
President	**Total**	**Average per year**	**Total**	**Average per year**		
Kennedy- Johnson	33	8	20	5	38%	8.8
Johnson	49	12	44	11	47%	5.1
Nixon I	13	3	27	7	66%	3.4
Nixon-Ford	12	3	29	7	71%	3.4
Carter	16	4	25	6	61%	4.5

Source: Paul C. Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Carter*, (Baltimore, MD: Johns Hopkins University Press, 1982), p. 127.

decade. Although the data are not precisely comparable, this trend is indicated in *Table 3-1*, which illustrates the number of major spending and nonspending program initiatives requested by presidents since 1960. It shows that the proportion of nonspending presidential initiatives, including regulation, grew from 38% of presidential requests in the Kennedy-Johnson years to approximately 70% in the Ford Administration, with a modest decline in the Carter years.

STRUCTURAL RESPONSIVENESS AND CONGRESSIONAL ACTIVISM

The effect on the presidency of a changing mix of political incentives was only part of the institutional dynamics of regulatory growth in the contemporary era. Another factor involved changes in the organization and operations of Congress. The legislative branch underwent enormous structural and political changes in this period that transformed it from a programmatic graveyard to an activist policymaking body, highly responsive to the regulatory incentives described above.

Developments in the executive branch, such as the expansion of the White House staff and proliferation of regulatory agencies, clearly contributed to the growth of regulation, especially through the rulemaking process. However, major studies of the enactment of federal regulation have identified Congress as the primary source of program initiatives. As one scholar emphasized:

> Although some important regulatory legislation of the new variety . . . grew from the initiatives of the Kennedy Administration, its chief source was neither the Kennedy, Johnson, Nixon, Ford nor Carter Administrations. Indeed it was not the executive branch at all, but Congress, and the legion of Congressional staff members on the lookout for issues through which their principals—particular Congressmen and Senators—could attain visibility and national prominence.[14]

Portraits of the Congress in the 1950s and early 1960s depicted an institution dominated by powerful committees ruled by a relatively small coterie of aging, conservative, and strongwilled chairmen.[15] Younger members of Congress, denied access to committee chairmanships because of the seniority system and lacking independent resources, generally deferred to the expertise of chairmen and the committees they controlled. Despite such deference, pushing legislation through the Congress in that era was often time-consuming and difficult. Coalition-building frequently required lengthy committee hearings and floor debate, continual compromising over legislative provisions in search of a combination able to attract majority support, behind-the-scenes negotiation with recalcitrant members, and sometimes tricky procedural maneuvering to assure that a proposal made it through each of the many potential barrier points. Because of the multitude of hurdles that had to be overcome, the policymaking process in Congress was generally slow, burdensome and inefficient. For legislation to survive the process, some outside influence—such as Presidential sponsorship or a policy crisis—was often considered necessary to prod Congress into action.

Changes in the membership, internal structure, operations and political environment of Congress have refashioned the national legislative process during the last dozen years. The Congress of the 1970s was characterized by a more equal, independent and liberal membership; by the erosion of traditional norms like apprenticeship, deference and seniority; by a tremendous growth of Congressional staffs and support agencies such as the Congressional Budget Office; by limitations on rules like the Senate filibuster that had been used to prevent passage of measures unpopular to a minority of members; by the proliferation of increasingly independent subcommittees; by an increased legislative independence vis-a-vis the executive branch; and by a decline in party loyalties. In short, Congress in the 1970s became more decentralized, fragmented and independent than in preceding decades.

One major effect of these changes, according to Michael Malbin, was an increase in the opportunities for entrepreneurial members of Congress to develop their own policy initiatives:

> . . . the changes first permitted liberal Democrats to find problems for government to address. After a while they came also to be used by new-style conservative Republicans who were equally eager to pursue their own legislative ideas. Congressional structures were adapted to serve self-promoting, individualistic legislative styles.[16]

Thus, members of Congress throughout the 1970s instructed their staffs to be agressive, to look for new problems amenable to legislative action, and to find ways to make their subcommittees active.[17] In an age when voters' attitudes and preferences are less well anchored to party loyalties and the strength of party organizations has declined, candidates must rely more heavily on media attention to get elected—and one of the surest ways to get exposure in the previous decade was to sponsor new legislative proposals.

Moreover, during the 1970s it became possible for an increasing number of legislative proposals to bypass the conventional, painstaking processes of coalition building. Several important measures—from privacy rights to handicapped regulations—glided successfully through Congress without committee support, without hearings, or without significant floor debate. Support for these proposals was not built painstakingly through negotiation, compromise, or logrolling but through an appeal to political symbols.[18] This new pattern has not completely eclipsed traditional methods of enacting legislation, but there now exist additional and speedier avenues through which sponsors of proposals can see their ideas gain enactment.[19]

In sum, the changes in Congress have been dramatic. They have increased the opportunities to skirt traditional legislative processes and have provided a conducive environment for a growth in entrepreneurial politics. According to Roger H. Davidson:

> In the 1960s critics worried about the representative character of congressional decision making. Long careers and low turnover seemed to heighten the insular, small-town atmosphere of the Hill; newly active political groupings, like blacks or consumers, were ill represented; the seniority system isolated committee leaders; legislative norms discouraged outsiders from participating; decision making all too often took place in closed circles and behind closed doors. Today . . . Capitol Hill is a far more open, democratic place than it was a decade or so ago. . . . Now the chief impression is of buzzing confusion. . . . In place of party labels there are individual politicians in business for themselves, and a series of shifting coalitions around specific issues. Instead of a few leaders or checkpoints for legislation, there are many.[20]

Taken together, then, all of these factors—public awareness and concern over such issues as civil rights, safety, the environment and energy; increased access of new interest groups to the political process; increased constraints on the federal budget; and the growing popularity of self-styled activism in Congress—contributed to a climate conducive to an outpouring of regulatory legislation. There remains, however, the question of why so much of the new regulatory legislation assumed an intergovernmental character. This is the subject of the next section.

THE CHOICE OF POLICY INSTRUMENT

Whether the federal government plays an active or phlegmatic role in pursuing regulatory responsibilities, national policymakers can choose from a variety of different regulatory strategies to address their goals. *Chapter 1* focused on the proliferation of intergovernmental regulatory instruments in recent years and identified four unique types: the crosscutting requirement, the crossover sanction, the partial preemption and the statutory direct order. Although analytically distinct, each of these devices either regulates state and local governmental processes directly or seeks to deploy them administratively in the regulation of the private sector on behalf of federal ends. Variations and combinations of these four types have been used in a multitude of federal programs in many fields of domestic policy. Yet there are also alternative regulatory instruments available to national lawmakers. As indicated earlier, the device favored during much of this century was the independent regulatory commission. Alternatively, direct federal regulation can be administered through an excecutive branch agency. Still another approach is to abandon entirely these legal-administrative mechanisms and rely instead on a market-incentive approach to regulate behavior.

A variety of factors may help explain why the federal government has turned increasingly to intergovernmental regulatory mechanisms over the past two decades—both in addition to, and often in preference to these alternative regulatory devices. It is certainly significant that many governmental functions subject to the newer intergovernmental regulations historically have not been a major component of the federal sphere of duties nor customarily a focus of federal regulation of interstate commerce. Rather, these newer areas traditionally were subject to state and local jurisdiction, and frequently a non-federal administrative structure was already in place. Moreover, the tradition of cooperative federalism under grants-in-aid created and institutionalized patterns of intergovernmental program implementation. Having grown accustomed to such relationships, federal policymakers sought to duplicate them in regulation. Indeed, two such mechanisms—crosscutting requirements and crossover sanctions—utilize existing grants as vehicles for regulation and thus are inherently intergovernmental in nature.

These and other factors influencing the federal government's turn to intergovernmental mechanisms in its recent regulatory enactments are illustrated in the following section. It traces the processes of initial formulation and subsequent proliferation of each intergovernmental regulatory type, concluding with a series of generalizations concerning the development and growth of federal mechanisms for regulating state and local governments.

Crosscutting Requirements

The first and most widely recognized instrument of federal intergovernmental regulation is the crosscutting requirement, which is a condition of aid that applies across-the-board to all or most federal grants to advance some national social or economic goal. Title VI of the *Civil Rights Act of 1964* was the first postwar program to use a requirement of this type. Following its passage, the mechanism was used extensively in other areas of federal policy. By 1980, the Office of Management and Budget identified a total of 59 crosscutting requirements intended to further a broad range of socio-economic and administrative goals. This section describes the major political and policy factors associated with the enactment of Title VI and compares its passage with that of subsequent crosscutting requirements. It shows that the effects and implications of crosscutting regulations were often poorly understood by Congress at the time of enactment. This pattern, first evident in the passage of Title VI, became especially pronounced in many later programs.

THE ENACTMENT OF TITLE VI

The essence of Title VI is expressed in a simply worded legislative statement that prohibits racial and ethnic discrimination in all federally funded programs. Specifically, it provides in part that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance.[21]

The origins of Title VI must be understood in both the context of traditional federal grant-in-aid practices and the unique Constitutional and political circumstances of civil rights policy. Because it applied to all assistance programs, the provision marked a major departure in federal aid requirements. Earlier provisions, attached to specific grants, had traditionally been characterized "not by federal control, but by a bargaining situation, with the states and localities operating at a substantial advantage."[22] Federal officials had learned very early that a smooth running and effective program was dependent on the good will and cooperation of state and local administrators. Hence, they spent a great deal more time advising and persuading than ordering and directing.

Such limitations were especially evident in the politically sensitive field of civil rights, where attempts to ensure that federal funds were spent for intended purposes in a nondiscriminatory way were generally unsuccessful. For instance, in the 1890s the Secretary of Interior denied payment of grant funds to South Carolina under the "separate but equal" provision of the *Land Grant College Act*, claiming that state officials were not allocating enough money to the Negro land grant college. The state, however, made an appeal to Congress and the funds were soon restored.[23] Later attempts to withhold funds were no more successful. In fact, even in cases where Congress upheld the administrative action, relationships with state officials deteriorated so rapidly that many federal administrators questioned whether the denial of funds would ever prove to be an appropriate weapon.[24]

Opinions on this issue began to change in the 1950s, however. Although the *Brown v. Board of Education* decision in 1954 initially appeared to spell the doom of Southern school segregation, such hopes quickly faded. Despite the eloquence of the Supreme Court decision, the judicial machinery—constrained by its case-by-case procedures and the unwillingness of many federal district judges to force desegregation on uncooperative local communities—had difficulty implementing the decision, except in a very few communities. Frustrated civil rights leaders soon began to consider using administrative sanctions applied through the grant-in-aid system to force more rapid local action. In the last years of the Eisenhower Administration and early years of the Kennedy Administration, they exerted substantial pressure to further such a policy. Reflecting this stance, the U.S. Civil Rights Commission, established in 1957 to study discrimination, recommended that segregated colleges be denied federal money. The Leadership Conference on Civil Rights and the moderate Southern Regional Conference recommended similar action during the Kennedy years.[25]

At issue initially was the question of the President's authority to take such extreme action. In late 1959, President Eisenhower directed the Secretaries of Labor, Justice, and Health, Education, and Welfare (HEW) to study racial discrimination in grant programs. A preliminary report on the issue concluded that the executive branch had the power to cut off money to segregated institutions, but this drew a sharp rebuttal from the HEW general counsel. He echoed the position of many program administrators in arguing that the Secretary of HEW was required to follow the procedures laid out in individual statutes and had no power to render independent judgments about constitutionally preferable alternatives. Other members of the administration agreed that only a Supreme Court order authorizing the denial of funds would justify such action.[26]

The issue was still unresolved when President Kennedy took office. Trying to calm Southern fears, HEW Secretary Abraham Ribicoff initially agreed that HEW had no authority to withhold grants. In early 1963, the Civil Rights Commission issued a report on conditions in Mississippi and renewed its call for funding cut-offs. The report claimed that "children, at the brink of starvation, have been deprived of assistance by the callous and discriminatory acts of Mississippi officials administering federal funds."[27] Nevertheless, President Kennedy continued to deny that he possessed authority to cut off funding under existing law and told a news conference that "it would probably be unwise to give the President . . . that kind of power because it would start in one state and for one reason or another it might be moved to a state which was not measuring up as the President would like to see it measure up. . . ."[28]

In just two months, however, the situation changed dramatically. In May 1963, a brutal assault on black demonstrators by the police force of Birmingham, AL, shocked and angered the public. As Orfield interpreted it:

> There was a classic moral clarity and simplicity about the confrontation between the crude and die-hard segregationist police chief and the eloquent religious determination of the marchers and their leader, Martin Luther King, Jr. The confrontation

> sent surging energy through the civil rights movement across the country and generated the national anger that made basic change possible.[29]

Kennedy suddenly realized that Congress and the country were ready to accept a wide expansion of federal authority in the area of civil rights. Almost immediately he sent to Congress a comprehensive civil rights bill, which included a weak fund-withholding provision. It was clear, however, that the president considered the Title VI provisions an "unimportant and expendable part of the entire package."[30] For instance, Orfield argues that:

> The Administration had no intention of using this power to set up federal desegregation standards for all school districts. Such a measure, the assistant attorney general testified, would be "completely unworkable" and would require massive military intervention.[31]

To Kennedy's apparent surprise, public concern over civil rights continued to mount throughout the summer of 1963. Mounting support spurred Congressional liberals to recast the Kennedy proposal for discretionary withholding authority into a mandatory enforcement provision that required federal withholding of grant funds in any program tainted by discrimination.

During the long months of protracted debate, relatively little attention was focused on Title VI compared to the controversy surrounding the public accommodations section of the bill. In the Administration's background materials, the Justice Department argued that the provision rarely would be used and that it merely provided procedural safeguards for the exercise of power the executive branch already possessed. Senate Majority Whip Hubert Humphrey (D-MN), the Administration's floor manager for the bill, accepted this interpretation and argued that the provision was noncontroversial:

> If anyone can be against that, he can be against Mother's Day. How can one justify discrimination in the use of federal funds? . . . President after president has announced that national policy is to end discrimination in federal programs.[32]

Humphrey, like the Administration, believed that the enforcement of Title VI should be closely connected to contemporary judicial standards. Thus, although the key term "discrimination" was not defined, it was assumed that only discrimination as interpreted by the courts would be forbidden. In fact, "Humphrey's argument suggested that the title was not [an] instrument of revolution . . . but merely a moderate grant of power to be used against only highly recalcitrant local officials."[33]

Notwithstanding the assessment of Title VI by Administration officials and Sen. Humphrey, other members of Congress argued that Title VI was a "wolf in lamb's clothing." For instance, Senator Sam Ervin (D-NC) declared that "no dictator could ask for more power than Title VI confers on the President."[34] Others called the provision "unprecedented," "unwise and vicious," and "the most dangerous grant of power . . . ever proposed in the long history of this government." But, according to Orfield, "these were only occasional remarks lost amid a torrent of abuse directed against the public accommodations section of the bill."[35]

Several procedural safeguards, however, were added to Title VI during Congressional deliberations, which were intended to address the fears of those who believed that the provision left open the possibility of arbitrary and extreme federal intervention.[36] The bill required that an agency could not cut off any funds until it had "determined that compliance cannot be secured by voluntary means," and the agency was directed to provide the offender the opportunity for a formal administrative hearing. In addition, the House and Senate committees with jurisdiction over the program for which the funds were to be withdrawn had to be notified and allowed 30 days for response, and Title VI expressly provided for judicial review of fund-cutoff actions. Congress also inserted an unusual provision requiring express Presidential approval of all agency regulations adopted to implement the legislation. The Senate added yet another provision that exempted employment practices from Title VI coverage "except where a primary objective of the federal financial assistance is to provide employment." Finally, a so-called "pinpoint" provision was added to Title VI that restricted funding cut-offs solely to "the particular program, or part thereof" in which discrimination was found.[37]

While politically significant, these modifications contributed less to the enactment of Title VI than did another jolting political development—the assassination of President Kennedy. Given the Kennedy Administration's earlier perspective that Title VI was a dispensable portion of the bill, it is possible that had President Kennedy lived, the provision would have been deleted in exchange for an end to the southern filibuster. Instead, President Johnson adopted what Orfield has described as an "uncompromising stand in favor of enactment of the complete measure that had become identified in the public mind with Kennedy's 'martyrdom.' "[38] The provision thus remained in the bill throughout the lengthy congressional consideration. A motion to srike it was crushed by a vote of 69–25 near the end of the Senate debate.

The enactment of Title VI subsequently proved to have far-reaching implications beyond the field of race relations. It represented a dramatic assertion of national authority over state and local activities and policies and a bold application of a new form of grant requirement. Its enactment, and the fact that the courts upheld it as a legitimate exercise of federal power, signaled to national policymakers that the conditioning of federal assistance funds was a powerful instrument that could be used to regulate state and local activities in instances where a direct order would be unconstitutional. Moreover, as a result of the bitter struggle preceding enactment of the *Civil Rights Act*, "states' rights" became identified henceforth in many policymakers' minds as the equivalent of resistance to desegregation and thus held little persuasive power in Washington or in the country as a whole.

THE ENACTMENT OF SUBSEQUENT CROSSCUTTING REQUIREMENTS

Following the enactment of Title VI, the crosscutting regulatory device spread rapidly to a host of other program areas—including additional civil rights programs, the environment, individual privacy and procedural goals. An examination of several of the most significant and controversial additions to crosscutting requirements indicates that the pattern of policymaking that produced them differed significantly from that apparent in Title VI.

For example, most analysts have commented on the relatively minor consideration afforded Title VI in comparison with the attention given to the public accomodations and private employment sections of the *Civil Rights Act of 1964*. In contrast to the debate preceding enactment of many of the subsequent crosscutting requirements, however, Congress gave comparatively close scrutiny to Title VI. In the end, the provision was a quite lengthy one, with explicit procedural safeguards attached to the use of the sanction and with relatively clear guidance on the scope of the measure. Although the meaning of the word "discrimination" was not fully explicated in the statute, it was clear from congressional debate and statutory language that the definition was closely linked to prevailing judicial standards.

Such clarity was absent from the later civil rights crosscutting requirements modeled after Title VI—including Title IX of the *Education Amendments of 1972*, which prohibits discrimination against women in educational institutions receiving federal aid; Section 504 of the *Rehabilitation Act of 1973*, which prohibits discrimination against handicapped individuals in federally assisted activities; and the *Age Discrimination Act of 1975*, which prohibits discrimination on the basis of age in activities supported with federal funds. Each of these three acts simply copied the active language of Title VI—usually without its accompanying limitations—with little attempt to determine its appropriateness for addressing specific circumstances in the new area of concern.[39] There appeared to be a powerful tendency in Congress to seize upon a seemingly successful device from another, unique field of policy with little deliberation, part of what Bardach and Kagan have labelled the "logic of regulatory expansion."[40] Accordingly, the process of enacting these provisions was distinctive from Title VI.

Unlike Title VI, for instance, Title IX, Section 504, and the *Age Discrimination Act* were not initiated by interest groups, nor did the forms of discrimination addressed by these measures generate the same degree of public concern and indignation as racial discrimination had. Although interest groups may have pressed for final passage and for full implementation of such laws once they were enacted, these proposals were spearheaded initially by individual members of Congress. Title IX was authored and championed in Congress by Rep. Edith Green (D-OR) and Sen. Birch Bayh (D-IN) at a time when most organizations representing women lacked political sophistication.[41] Those that were well organized had their sights set on the *Equal Rights Amendment*. Similarly, although the interest groups representing the elderly were on record in support of an age discrimination ban, none specifically pushed for it in 1975. Rather, the measure was conceived on Capitol Hill.[42]

The evidence on the role interest groups played in the enactment of Section 504 is somewhat less clear. It too was authored by a congressman, Rep. Charles A. Vanik (D-OH), without substantial consultation with the wide range of groups representing the interests of the handicapped.[43] Because he was not a member of the Judiciary Committee nor of the Select Committee on Education (which had jurisdiction over rehabilitation programs), he asked Sen. Hubert Humphrey (D-MN) to introduce the bill. The bill was referred to the Judiciary Committee as an amendment to the *Civil Rights Act*, but when it made no progress there, Humphrey offered it as an amendment to rehabilitation services legislation then winding its way through Congress. Some observers argue that handicapped groups were fully aware of the measure and helped to engineer its enactment. Such groups, these analysts contend, felt that its chances of approval would be enhanced by attaching it to the massive rehabilitation bill, by maintaining low visibility, and by not demanding hearings.[44] Close scrutiny of the measure's implications, this interpretation holds, would have doomed it.

Regardless of the role played by interest groups, Section 504 received virtually no attention in Congress.,According to Martin LaVor, a staff member of the House Education and Labor Committee:

> Section 504 did *not* have one day of Congressional hearings, *not* one word was mentioned in the Senate Committee Report, *not* one word was spoken about it on the floor when the original bill passed, and there was *no* explanation in the Statement of Managers following the House-Senate Conference.[45]

In fact, the legislation did not state whether the executive branch was to issue regulations and enforce the provision, so Congress was forced the next year to supply a retroactive legislative history in a Senate report on the *Rehabilitation Amendments of 1974*.

There was a similar lack of attention to Title IX and the *Age Discrimination Act*. Title IX originally was proposed in 1970 as a direct amendment to Title VI. Although hearings were held on the general issue of sex discrimination in universities that year, there was no discussion of the appropriateness of the fund-withholding provisions. No further hearings were ever held on Title IX despite the fact that it did not become law until two years later.[46] Similarly, no hearings were held on the *Age Discrimination Act*, and Congress did not require a study of the issue until after the bill had been passed.[47]

There are still other points of contrast between Title VI and the three later civil rights crosscutting requirements. Title IX, Section 504 and the *Age Discrimination Act* were enacted without the benefit of strong Administration support. In fact, the executive branch played a very small role in the initiation of any of these provisions. President Nixon signed the *Education Amendments of 1972* without mentioning Title IX and, although he twice vetoed the *Rehabilitation Act*, Section 504 did not appear to be at issue. President Ford signed the *Age Discrimination Act* only with reluctance, due to his misgivings regarding the imprecise definition of age discrimination in the legislation. This pattern stands in sharp contrast to Title VI, which originated in the executive branch and was actively supported by President Johnson.

Interestingly, none of the three later measures was enacted as an amendment to Title VI, despite their obvious resemblance to that provision. Title IX and Section 504 were first proposed as amendments to Title VI, but neither of them made any progress through the Congressional judiciary committees. Ironically, however, there is little evidence of determined or substantial opposition in Congress to any of the three subsequent laws. For the most part, they passed Congress by relatively large margins and were the focus of little attention. Whatever controversy they aroused followed rather than preceded their passage.

The initial lack of controversy associated with Title IX, Section 504 and the *Age Discrimination Act* may appear surprising when one considers that none of the three forms of discrimination addressed is expressly prohibited by the Constitution, as racial discrimination is under the 14th Amendment. Even before Title VI was enacted, many believed that the executive branch already had the authority to ensure that federal funds were not being spent to promote racial discrimination, since *Brown* and other decisions had declared "separate but equal" facilities to be unconstitutional. In contrast, judicial opinions concerning the status of age, sex and handicap discrimination under the 14th Amendment have often been conflicting and unclear. Thus, the enactment of Title IX, Section 504, and the *Age Discrimination Act* clearly constituted *new* delegations of power to the executive branch. Moreover, these three measures were not tied as closely to existing judicial standards as Title VI was because no clear legal standards had been developed. Instead, subsequent court decisions in such cases of discrimination were frequently based on the statutes in question and their implementing regulations, rather than vice versa.

In short, the later civil rights statutes appear to have been the products largely of entrepreneurial politics in the Congress of the 1970s, rather than traditional interest group or presidential initiatives. The relative ease with which the three measures examined moved through the legislature suggests that Congress had grown comfortable with the crosscutting requirement as an instrument of intergovernmental regulation and with the threat of fund withholding as an enforcement mechanism.

NON CIVIL RIGHTS REQUIREMENTS

Congressional acceptance of the crosscutting device is further indicated by the dramatic increase during the 1970s in the number of across-the-board conditions in areas other than civil rights, such as environmental protection, occupational health and safety, and individual privacy. The first major use of the crosscutting requirement in environmental policy was included in the *National Environmental Policy Act* (NEPA), which required the preparation of environmental impact statements. When enacted in 1969, NEPA was attended by very little public or special interest attention. In fact, according to several observers, only a few members of Congresss were well informed about the implications of the law they were adopting. One Congressional aide concluded that "if Congress had appreciated what the law would do, it would not have passed."[48] Yet, with the pattern established, a host of additional environmental crosscuts quickly followed on the heels of NEPA, advancing such objectives as clean air and water, historic and cultural preservation, coastal zone management and the protection of endangered species. A study of this last program called it:

> One of the last pieces of symbolic environmental legislation passed to satisfy a powerful environmental lobby with ostensibly few associated costs.... Congress defined the law [in uncompromising terms] because no one told them not to.[49]

Another crosscutting requirement, the *Family Educational Rights and Privacy Act of 1974* (FERPA), requires that all educational institutions receiving federal funds provide full student and parental access to educational records and it limits the disclosure of such records to others. FERPA was born out of the efforts of one legislator, Sen. James L. Buckley (CON-NY). The impetus for the legislation was not a wave of public concern over the problem addressed by the policy, nor any strong indication that the problem required a national solution. No Congressional hearings were ever held on the matter. Although his proposal aroused little active support from interest groups, the executive branch, or the general public, Sen. Buckley nevertheless managed to see his legislation adopted on the Senate floor in amendment form. His success can be attributed in part to the powerful appeal of the popular notion that personal privacy should be protected against governmental abuse. In addition, potential pitfalls were never explored for lack of hearings on the matter.[50]

On the basis of the six influential requirements examined here, several tentative generalizations about the origins and growth of crosscutting regulations can be distilled. Because civil rights and other socio-economic requirements have been highlighted at the expense of procedural requirements, these six regulations do not constitute a perfect cross section of all across-the-board requirements. Although a fuller understanding of procedural requirements must await further study, there is some reason to believe that their development may have varied somewhat from the regulations studied here. Certain significant procedural requirements grew more incrementally and evidenced a stronger executive branch role in their initial formulation. Some, like the *Uniform Relocation Act*, were intended to standardize and simplify multiple conflicting provisions contained in individual grant programs.[51]

Nevertheless, the six requirements examined above have all been salient and influential additions to the growth of federal intergovernmental regulation. Title VI clearly established a policy instrument of landmark proportions that was widely imitated. Similarly, NEPA helped spur a variety of subsequent environmental regulations. Thus the regulations here provide an illuminating but preliminary understanding of the political dynamics of proliferating crosscutting regulations.

Significantly, the policy formulation process for all of the post Title VI regulations studied had important common features. Similarities were especially pronounced in the civil rights requirements, which were expressly patterned after Title VI, but all of the crosscuts adopted a moralistic approach to problem solving and derived political support from their appeal to symbolic principles.[52] That is, members of Congress and the public at large endorsed the goals of these programs without necessarily understanding the policy and operational implications of the regulatory mechanism being adopted.

Following the pattern established in Title VI, crosscutting requirements sought to halt potential discrimination in federal programs, protect personal privacy or save the environment immediately and comprehensively, rather than address these problems individually as they arose under the host of widely varying grant programs to which the crosscuts automatically applied. The legislative histories show that Congress, by focusing on widely accepted abstract goals, consistently failed to define its specific policy objectives or attend to the administrative implications of these regulations. In particular, it devoted little consideration to determining the appropriate role of crosscutting devices in the grant-in-aid system, to exploring their ramifications for existing policy goals, or to studying the consequences of excessive use of the device.[53]

Another pattern common to the regulations studied was the role of political entrepreneurs in formulating and mobilizing support for crosscutting initiatives. In general, neither executive branch officials nor outside interest groups appeared to be the principal source behind post Title VI initiatives. Instead, they were developed by Congressional activists in search of attractive policy ideas.

Despite such political commonalities, certain variations apparent in the origins of these programs should not be overlooked. Most significant, of course, were differences between the adoption of Title VI of the *Civil Rights Act of 1964* and the enactment of subsequent crosscutting regulations. The process apparent in the case of Title VI more closely resembled the traditional pattern of interest group pressure and executive leadership than did the subsequent Congressionally inspired programs. In addition, Title VI generated much more controversy during its enactment, partly because it represented the first major use of the crosscut technique in recent times and partly because of the policy field involved. Although the provision was often overshadowed by other portions of the landmark civil rights law, there was much initial hesitation in endorsing so sweeping a regulatory device. Both the Kennedy and Eisenhower Administrations were reluctant supporters of the concept.

On the other hand, compared to later regulations, Title VI enjoyed a particularly strong political and legal footing. It was intended to address one of the most pernicious and vexing social problems in American history, which might not have been addressed for years in many states without strong federal intervention. In addition, federal regulation of the states in the area of civil rights was explicitly sanctioned by the Constitution.

Apart from differences with Title VI, the enactment processes for the later crosscuts also varied somewhat from one another. The technique spread to other civil rights areas and proliferated rapidly in the environmental field, but it expanded very little in several other policy fields.[54] Although all of the later regulations studied passed with relatively little initial scrutiny, some advanced through the normal congressional committee process while others were adopted in a truncated manner as floor amendments. Some, like Section 504 and Title IX, were largely overlooked provisions of large omnibus bills; others were subjected to somewhat more individualized attention. Such differences, however, were less significant overall than the commonalities among the programs studied. Above all, it is significant that following resistance to the first major use of the crosscutting instrument, opposition to the mechanism faded and it rapidly became a popular and widely used means of intergovernmental regulation.

Crossover Sanctions

The crosscutting requirements discussed above are all conditions of aid that apply across-the-board to all or most federal grant programs. A crossover sanction, on the other hand, is a provision attached to one grant program which states that if certain requirements of the program are not complied with, then federal funds can be withheld from other wholly separate federal grant programs—even though the requirements of those programs have not been violated. Thus the penalty "crosses over" from one program to another.

Other differences also exist between the two mechanisms. A few very early crosscutting requirements (including the *Davis-Bacon* and *Hatch Acts*) date back as far as the 1930s, although the period of great expansion in the use of the device followed passage of the 1964 *Civil Rights Act*. In contrast, crossover sanctions are a totally modern invention, first established with the *Highway Beautification Act of 1965*. The device subsequently spread to at least four additional federal programs: the *National Health Planning and Resources Development Act of 1974*, the *Federal Aid Highway Amendments of 1974*, the *Education for All Handicapped Children Act of 1975*, and the *Clean Air Act Amendments of 1977*. Moreover, similar mechanisms have begun to appear in Medicaid and public assistance programs and in a variety of transportation programs.

Crossover penalties have not yet spread to the extent that crosscutting requirements have. Where they have done so, however, the process of accumulation has appeared to roughly parallel that found in across-the-board requirements. The period of rapid expansion for both devices occurred from the mid-1960s through the 1970s. In addition, the expansion of both techniques began gradually. Once initial enactments broke political barriers to the use of each device, subsequent adoptions faced considerably less resistance.

HIGHWAY BEAUTIFICATION

The crossover sanction technique was first used in the *Highway Beautification Act of 1965*,[55] enacted only one year after passage of the *Civil Rights Act of 1964*. The *Beautification Act* authorized the Secretary of Commerce (currently the Secretary of Transportation) to withhold 10% of all federal highway funds from any state that refused to "effectively control" billboards along the interstate and primary highway systems. In 1966, such withholding represented a potential penalty which ranged from approximately $1.36 million in Rhode Island to about $36 million in California. By 1980, these figures had grown to $2.37 million in Rhode Island and $55 million in New York.[56]

Billboard control was hardly a new issue when Congress passed the *Beautification Act* in 1965. In fact, the debate between the billboard and anti-billboard lobbies had raged since the mid-1950s in Congress and for decades in many state capitols. On one side stood the outdoor advertising industry and roadside business groups represented by such groups as the Outdoor Advertising Association of America, Inc., and the Roadside Business Association. On the other side were conservation organizations, garden clubs, and various women's and civic groups.[57] The first extension of the contest to the national level came in 1955 when Sen. Richard Neuberger (D-OR) proposed amending the *Federal-Aid Highway Act* to permit joint federal-state procurement of advertising easements along the interstate highway system as part of the land acquisition process. The amendment did not compel the states to agree to the acquisition of easements, and it directed the federal government to pay 90 percent of the cost of such easements. Yet, according to James Sundquist:

> . . . even this limited amendment ran into a withering attack on the Senate floor as an invasion of states' rights. "I do not wish to have the federal government intervene and say what the states must do in reference to lands adjacent to the public highways running through the states," declared the patriarchal Walter F. George, Georgia Democrat, in leading the assault. The opposition to billboard regulation appeared strong enough to endanger passage of the highway bill itself. After a huddle with the bill's managers, Neuberger yielded, and the amendment was deleted by unanimous consent.[58]

The battle was by no means over, however. Following the 1955 incident the contending groups readied themselves for another fight in 1957. Sen. Neuberger again submitted his proposal for federal sharing of the costs of advertising easements. Soon afterward, Commerce Secretary Sinclair Weeks unveiled an alternative bill replacing the federal cost-sharing plan with a penalty for states refusing to comply with federal billboard statutes. Five percent of the federal share of interstate highway projects would be withdrawn for noncompliance, so that the states would be required to pay 15% rather than 10% of highway costs. Weeks claimed that his proposal was "in accord with the program of the President," but at a news conference a month later, President Eisenhower expressed doubt that the government had the right to impose such a penalty.[59]

Organizations on both sides confronted each other in the hearings and organized an intensive letter-writing campaign. The principal argument of the advertising industry was that since the states already had the authority to regulate advertising, they could take action on their own when it was desirable and warranted. Federal legislation in this area, they alleged, would not only be preemptive, it rested on the mistaken assumption that the states were unaware of the problem. Advocates of the legislation, on the other hand, argued that many states had failed to do anything about the problem and that the federal government had the power and obligation to protect the highway system it initiated and was heavily financing. According to several surveys, public opinion lay on the side of the advocates.[60]

The Senate Subcommittee on Public Roads, arguing that Congress could not renege on its commitment to finance 90% of the cost of interstate highways, quickly rejected the penalty approach. Instead the members agreed, although only by one vote, to strengthen the financial incentive by increasing federal highway funds to any state that enacted sign controls. After an intense debate on the Senate floor, the members agreed by a vote of 47-to-41 to give any state meeting federal billboard standards a bonus of 0.5% of the federal-aid highway funds otherwise allocated to the state. The House and the President accepted the Senate version and incentive grants were established to promote sign controls.

In 1965, President and Lady Bird Johnson took up the struggle for billboard control as a part of their personal campaign on behalf of beautification. By that time, most observers were in agreement that the bonus system had failed. Only half of the states had passed the legislation necessary to make them eligible for the bonuses and less than 1% of the highway system had been brought under billboard control.[62] In February, Johnson declared that enhancement of natural beauty was a national goal and requested that Congress rewrite the highway beautification legislation. In May, he convened a White House Conference on Natural Beauty during which the Administration bill was developed. It proposed to withhold all highway funds to states not in compliance with federal standards by 1968. Clearly, the political climate had changed.

In fact, according to Sundquist, the Outdoor

Advertising Association had shifted its position by 1965 and had dropped its earlier ideological and Constitutional opposition to federal legislation. Accepting the inevitability of national regulation, it demanded only that advertising be allowed in areas zoned for business use.[63] Still, the compromise position of only one organization did not signal an end to the battle. When the bill reached Congress, the myriad small businesses whose survival depended on the highway trade vigorously opposed the bill. The Senate Public Works Committee responded to their pleas by inserting a provision requiring compensation to both sign owners and the owner of the land on which the sign stood, and the penalty for noncompliance was reduced from 100% fund withholding to 10%. Despite these changes, the President continued to support the bill vigorously and it passed the Senate with strong bipartisan support (63-14).[64] Although it also passed by a wide margin in the House (245-138), a majority of Republicans in that body voted against it (29-89).[65]

In short, Congressional attitudes toward the crossover sanction technique—especially though not exclusively among the Democrats—shifted dramatically between 1958, when the penalty approach was rejected out of hand, and 1965, when the question had become not whether to withhold but how much. Several factors contributed to this shift. First, it is clear that President and Lady Bird Johnson's active support of the 1965 bill was crucial to its final passage. Indeed, according to one analysis, "the fact that [the bill] was enacted at all in 1965 was due almost entirely to intensive presidential pressure, particularly in the House."[66] One member of the House Public Works Committee said at the time that he had "never before seen such pressures and arm twisting from the executive branch ... as I have seen with respect to the highway beautification bill."[67] Other members expressed similar sentiments on the floor. When compared to President Eisenhower's expression of ambivalence regarding the first suggestion of a limited penalty, President Johnson's support for total withholding became even more significant.

Second, the position of those advocating highway beautification penalties was strengthened by the ineffectiveness of the existing incentive approach. Whether the bonus offered was too small or the advertising industry's opposition too strong in state capitols, by 1965 it had become clear that the 1958 measure was ineffective. Congressional options for dealing with the problem had narrowed. In 1965, debate focused not on whether highway beautification was a legitimate national purpose but over how to make an existing program more effective.

A third factor that may have influenced this shift was the new legitimacy afforded fund withholding by the enactment of Title VI the year before. Certainly the battle over Title VI had taken a heavy toll on the states' rights principle. By 1965, it was clear that states' rights was associated in many peoples' minds with a resistance to desegregation. Although a modest incentive approach to billboard control was cast aside in 1955 on the grounds that it violated the states' right to control their lands, there was only moderate resistance a decade later to initiating a new coercive withholding mechanism.

Finally, passage of the 1965 legislation was considered only a partial victory for its proponents. The bill's provisions had been seriously weakened during Congressional debate, with the penalty for noncompliance being reduced from 100% of a state's highway allocation to 10%. Nevertheless, the law represented a dramatic shift in federal highway beautification policy. And, whether consciously or not, Congressional adoption of the crossover sanction set a precedent for future use.

A NATIONAL SPEED LIMIT

In 1974 Congress passed the *Federal-Aid Highway Amendments*, which prohibited the Secretary of Transportation from approving federal aid construction projects in any state that failed to establish a maximum speed limit of 55 miles per hour and to certify that the speed limit was enforced. As in the case of the highway beautification legislation, this law was preceded by repeated efforts to get the states to lower their speed limits voluntarily since this was considered a state function. For instance, in May 1973, the Secretary of Transportation urged governors to conserve gasoline and reduce highway accidents by reducing driving speeds. In early June of that year, the

Senate adopted a resolution requesting states to lower speed limits and a few weeks later President Nixon made a similar plea.[68] By the end of 1973, a majority of states had taken some action to comply voluntarily with these entreaties.[69]

Nevertheless, these efforts at persuasion were soon discarded in favor of more direct pressure. This shift was precipitated by the energy crisis resulting from the 1973 Arab embargo on oil exports to the United States. In the flurry of executive and congressional actions responding to the crisis, a national maximum speed limit law was enacted on a temporary basis in January 1974, enforced by a crossover sanction provision requiring a cutoff of all federal highway funds to states refusing to comply.[70] By March, all 50 states had reduced their speed limits, and average speeds on the nation's highways had fallen.[71] Later in 1974, Congress made permanent what had been intended as a temporary measure.[72]

Despite growing opposition over time, the national speed limit has remained in effect, although its crossover penalty provision was modified in 1978. After 1975, compliance with the speed limit declined appreciably, but federal administrators were reluctant to exercise the penalty because of its severity.[73] In order to "achieve greater compliance" and establish a "more supportive and performance oriented" penalty, Congress altered the existing statute's provision for a total cut-off of federal highway funds to noncomplying states.[74] In its place was established a graduated system of enforcement with a sliding scale crossover sanction provision. States may now lose 5% to 10% of their highway funds if they fail to assure that a growing proportion of drivers obey the 55 mile per hour limit. This provision is currently being phased-in over five years, with the requirement that a grater percentage of a state's drivers obey the speed limit each year if the penalty is to be avoided.[75]

HEALTH PLANNING

The crossover sanction was also employed in the *National Health Planning and Resources Development Act of 1974*, which, according to one analyst, "intrudes upon state and local operations to a greater degree than almost any other grant program."[76] The law, which was enacted in an attempt to control soaring health care costs, directs states to establish certificate-of-need programs to evaluate all proposed construction and capital development projects undertaken by health care facilities. To establish such a program in most states, the state legislature had to enact certificate-of-need legislation meeting minimum federal standards. The complex measure also mandates an extensive planning and regulatory network to control health care costs and improve access to services, prescribing in great detail the administrative structure to be organized at the state level. Any state that fails to comply with the multiple provisions of the statute jeopardizes its entitlement not just to planning funds, but also to all other allotments under the *Public Health Service Act*, the *Community Mental Health Centers Act*, and the *Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970*.

National health planning legislation was bitterly opposed by both medical interests and state and local elected officials. Ironically, the states had pioneered the concept of hospital cost control, and a majority of them already had certificate-of-need legislation on the books when Congress enacted the *Health Planning Act*.[77] Nevertheless, national legislation passed both houses of Congress by very large margins—including majorities of both parties.[78] A number of factors contributed to this outcome. First, the measure was conceived during a period in which inflation was considered one of the nation's most pressing problems. The Nixon administration was actively attempting to control health-care costs, which had been rising at a faster rate than most other costs, by instituting cost controls on the medical industry as part of the Administration's economic stabilization program. Other factors leading to the advocacy of health care regulation by the Administration and Congressional leaders included: a dramatic growth in the federal share of health-care expenditures; a belief that without effective controls in place, the potential passage of national health insurance would trigger another big increase in demand similar to that which followed the passage of Medicare; growing recognition that medical services were not well distributed and were increasingly duplicative; a perception that existing health planning programs were ineffective or obsolete; and a skepticism regarding the commitment of state officials to controlling costs. The bill attracted the support of liberal Democrats, who were predisposed toward tough regulation of the health care industry, as well as many Republicans, who believed that some cost control device was needed but wanted to avoid direct federal controls.

In the debate over the bill's many complicated provisions, the crossover sanction received very little attention. State and local officials and their Washington representatives were preoccupied with other matters when the bill was being developed and gave it little chance of passage.[79] As the measure made its way through Congress, however, they took a more active interest in its provisions. Still, the crossover sanction, which all doubted would ever be imposed, was of less concern than the dictating of administrative structures and the certificate-of-need requirements. On none of these matters, however, did the views of state and local officials significantly influence legislative design.

Like the 55 mile per hour speed limit, the requirements of the *Health Planning Act* were so difficult to implement and the sanction for nonattainment was so severe that legislative modifications were enacted before the penalty could be imposed. In 1979, Congress extended the deadlines for state compliance with the health planning law and established a more gradual phase-in of sanctions in the event of noncompliance.[80] The planning requirements were relaxed even further and the penalty was again delayed in 1981, although the crossover sanction principle remains in the legislation.[81]

Over time, additional crossover sanction provisions have been inserted in other federal programs, including the *Education for All Handicapped Children Act* and the *Clean Air Act Amendments of 1977*. In the latter instance, Congress added a provision requiring federal withholding of highway and sewage treatment grants if certain aspects of the *Clean Air Act* were not complied with. Specifically, the new penalty was intended to strengthen direct order provisions of the 1972 law mandating development and enforcement of State Implementation Plans that were being challenged successfully in the courts. Because other elements of the 1977 Amendments were even more controversial than the new penalty, however, adoption of the provision did not attract much congressional attention at the time of adoption.[82]

In summary, the process of expanding use of crossover sanction provisions roughly resembled the pattern discovered earlier in the case of crosscutting requirements. Both regulatory mechanisms encountered the greatest political difficulties during enactment of the initial program using the technique, in part because each represented a striking expansion of the conditional spending power. Surprisingly little opposition developed to the subsequent use of these techniques for additional purposes. This was true even in comprehensive regulatory programs like health planning, clean air, and *Education for the Handicapped*—other provisions of which did arouse considerable opposition. In short, a remarkable transformation occurred in the regulatory politics of crossover sanctions, evidenced by a rapid dwindling of political opposition to use of the technique after passage of the *Highway Beautification Act*. Even in programs like the 55 mile per hour speed limit and health planning, in which substantial obstacles to implementation of the sanctions arose, the penalty provisions were only modified and delayed, not abandoned.[83]

Partial Preemption

As explained in *Chapter 1*, the partial preemption mechanism has two distinguishing features: first, the authority to set regulatory policy in a particular domain is declared to be a federal rather than a state or local responsibility; second, subnational governments are encouraged or required to adopt, administer and enforce national policy standards in that area. Thus, partial preemption centralizes policy formulation, but it shares policy implementation with the states. This mechanism has been used extensively in the areas of environmental protection, meat and poultry inspection, occupational safety and health, and, most recently, energy regulation. Prior to the adoption of the partial preemption mechanism, regulatory authority in each of thse areas was considered a state and local responsibility. Today, ultimate authority to regulate in these fields has been legally preempted by the federal government, with subnational governments retaining a large role administering programs within their jurisdictions.

FROM COOPERATION TO COOPTATION

Like the other regulatory devices already examined, the period of greatest growth for partial preemption programs occurred during the late 1960s and the 1970s. In general, this growth appeared to be propelled by two frequently conflicting considerations. First, these regulations were often products of a thrust for strengthened standards which, in most cases, meant a drive for *national* standards. Prior to enactment of these laws, it was generally believed that serious problems of public health, safety, or environmental protection were being inadequately addressed by many states. For example, the *Wholesome Meat Act of 1967* was described by one source as "the most emotional consumer issue of 1967."[84] Although most meat was inspected according to existing federal statutes governing products sold in interstate commerce, 21 states were found to lack mandatory statutes governing inspection and processing of meat sold within state. A similar situation spurred enactment of the *Wholesome Poultry Products Act of 1968*,[85] while proponents of OSHA contended that the growth rate of occupational injuries necessitated federal legislation.[86]

In some cases, like the *Wholesome Meat Act*, state officials testified against strengthening the national role. In other cases, however, state and local officials were divided over the issue of federal involvement or even endorsed the imposition of federal standards. For instance, much of the environmental legislation of the late 1950s and early 1960s—including the *Water Quality Act of 1965*—was supported by the urban lobby, notably the U.S. Conference of Mayors and the National League of Cities. According to one account of this legislation:

> Urban mayors and administrators ... had several good reasons for supporting the federal environmental role as strongly as they did. First, ... they recognized the regional nature of pollution and the corresponding futility of a single city's efforts to abate it. Second, ... uniform federal regulations were perceived as the only way to protect the integrity of a city's air and water resources, while, at the same time, holding on to a vital industry. Finally, economic incentives in the form of construction grants continued not only to grow across-the-board, but, increasingly, to favor the larger urban areas.[87]

Even on the highly intrusive *Water Pollution Control Act of 1972*, the states were unable to present a united front in opposition to a much stronger federal role in setting and enforcing water pollution standards. Although a majority of states opposed such provisions, several broke ranks and questioned the adequacy of existing programs in other states.[88]

In fact, the partial preemption mechanism appeared to be responsive, on the surface at least, to legitimate state concerns. Although the device established national preeminence and national standards, the federal government did not totally preempt regulation in these fields. The states were granted an important role in administering and enforcing such acts, subject to federal supervision and approval, and federal statutes were sometimes patterned after model state programs. Not only did this division tend to mollify conservatives and state officials who were wary of an increased federal role, it promised to enhance program performance by utilizing existing state resources and expertise. A majority of states had meat inspection programs in place prior to enactment of the *Wholesome Meat Act* in 1967. Many states had extensive backgrounds in occupational safety and workmen's compensation legislation prior to the passage of OSHA in 1970 and all states had at least some legislation on the books in this area. Similarly, all states had some degree of involvement in natural resource conservation and pollution control prior to the massive federal environmental regulation of the 1970s. The partial preemption device, then, appeared to make use of this experience and to avoid excessive centralization while simultaneously strengthening national standards. In fact, one federally administered environmental program, the *Federal Insecticide, Fungicide, and Rodenticide Act of 1947,* was converted in the 1970s into a partial preemption program with state administrative and enforcement responsibilities because the original centrally administered structure had proven unworkable and ineffective.[89]

Thus, the structure of partial preemption programs appeared to utilize the strengths of all levels of government. Politically, this division of responsibilities often proved helpful in attracting both conservative and liberal support for such programs. For example, President Nixon proposed legislation similar to, though less stringent than, OSHA, the *Clean Air Act*, and the *Federal Environmental Pesticide Control Act of 1972*, and all of these enactments passed with strong bipartisan support in Congress. Similarly, the adoption of the partial preemption technique in the *Water Quality Act of 1965* reflected a compromise between those who favored a national enforcement program and those favoring state standard setting. This apparent balancing act led Arthur MacMahon to hail the technique as an instrument of cooperative federalism:

> The essence of federalism in the face of emergent problems will not only survive but also will flourish in the opportunity for energetic states, on the one hand, to push ahead with still more rigorous standards where they are appropriate and, on the other hand, to share in the controls under delegations of authority from the national government.[90]

Chapter 4 examines subsequent problems in implementing many of these programs that tended to dim such enthusiastic expectations. Some have argued that the initial vision of cooperative federalism has become translated in practice into mere "lip service federalism."[91] Others detect a transformation in recent partial preemptions from voluntary state participation to "legal-conscription" of state administrative structures by the federal government. Dubnick and Gitleson note that certain programs "literally force subnational units to act on behalf of national policies," allowing Washington to assume "the role of a hierarchical superordinate that can use coercive sanctions to compel cooperation from state and local units."[92] Certainly, the intergovernmental balance many advocates of these programs originally hoped for has proven difficult to achieve in practice.

The inherent tensions between stronger national standards and assuring a continued state role structured the broad political context in which partial preemption programs developed, but this context does not reveal much about the actual dynamics of enacting such legislation. In fact, variations were readily apparent in the enactment of certain programs. OSHA, for example, represented a fundamental breakthrough in the federal role in the occupational safety field, whereas the meat and poultry inspection laws of 1967 and 1968 were extensions of a long history of prior federal involvement.

The differing origins of federal regulatory involvement can be illustrated best in the environmental protection area, where the partial preemption mechanism has been most widely used. The first and most significant federal environmental programs dealt with the control of air and water pollution. Federal involvement here was long standing and it developed incrementally, beginning with research and demonstration programs, to which grants-in-aid and finally regulatory provisions were slowly added. In the atmosphere of widespread environmental concern during the early 1970s, the regulatory components of these laws became substantially more complex and coercive.

Newer programs adopted in the 1970s, like the *Safe Drinking Water Act of 1974*, the *Resource Conservation and Recovery Act of 1976* and the *Surface Mining Control and Reclamation Act of 1977,* followed a more rapid pattern of development than did air and water regulations. They were framed from the start on the partial preemption model and greatly accelerated or even skipped many earlier phases of incremental policy development. A more detailed examination of the development of these programs tells much about the manner in which the partial preemption mechanism developed and spread.

THE CLEAN AIR AND CLEAN WATER ACTS

The history of the federal government's entry into the fields of air and water pollution control illustrates how the partial preemption mechanism in environmental protection developed and why it has proven to be politically popular.[93] Until the middle of this century, the legal authority to control both air and water pollution belonged almost exclusively to state and local governments. The struggle to secure the first national legislation was a protracted one, as Davies and Davies observe:

> Twenty years elapsed between the first major push for federal water pollution control legislation and the passage of the *Water Pollution Control Act of 1956*. The 1948 Donora Disaster brought the air pollution problem to national attention, but it took 15 more years until passage of the first permanent control law.[94]

Early federal legislation for both air and water pollution was aimed primarily at providing research and technical assistance to the states. Even these modest efforts were opposed by both industry and the states on the grounds that pollution control was not in the federal domain. As a result, the early legislation carefully delimited federal powers. For instance the *Water Pollution Control Act of 1948* stated that:

> . . . it is hereby declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states in controlling water pollution.[95]

In fact, as late as 1960 President Eisenhower vetoed a Democrat-sponsored bill to expand federal aid to localities for sewage treatment with the declaration that: "Water pollution is a uniquely local blight. Primary responsibility for solving the problem lies not with the federal government but rather must be assumed and exercised, as it has been, by state and local governments."[96]

By that time, however, the initial hurdle of justifying a federal role had been overcome, and Eisenhower was unable to reverse the direction of policy expansion. In fact, once the federal government had made its way into the field of pollution control, the pace of legislation accelerated. Seaching for new ways to tackle the problem of pollution, Congress began the process of carving out a larger and larger role for the federal government. What appeared to be small, incremental additions to pollution programs when viewed year-by-year represented a significant alteration in the federal role by 1966. The ACIR has summarized the changes in water pollution legislation this way:

> From 1948 to 1966 federal spending for water pollution control increased from a small loan program funded at about $1 million per year to a grant-in-aid outlay of [$700 million per year.] In the same period, Congress moved from a posture of denying federal authorities any enforcement powers to requiring the enactment of national water quality standards in the event that an individual state chose not to specify its own clean water criteria. In order to rationalize its emerging enforcement powers, the federal government moved from timid reliance upon its powers to tax and spend for the general welfare as a basis for its intrusion . . . to increasingly broader interpretation of the interstate commerce clause. . . . Finally, the stated purpose of legislation underwent a significant metamorphosis, from protecting the rights and responsibilities of the states to establishing a national policy.[97]

Thus, by the mid-1960s, the outlines of a partial preemption structure had been established. The *Water Pollution Control Act of 1965* authorized the federal government to impose its own standards on a state if it failed to file a declaration of intent to establish pollution control standards, if the state standards were not in place by a certain date, or if the Secretary of HEW considered the standards inadequate. That provision represented a significant victory for Sen. Muskie (D-ME), who by that time had established himself as the prime architect of pollution control legislation. He advocated a moderate position between a Johnson Administration proposal for a national enforcement program with national standards and House legislation that left the responsibility for standard-setting with the states.[98]

A similar evolution in the federal role

occurred in air pollution legislation, although this field was generally a step behind the trend in water policy (see *Figure 3-3*). Federal involvement began tentatively and nonintrusively, until the *Air Quality Act of 1967* established a regulatory mechanism similar to that of the 1965 water act. Again, the provision represented a compromise between President Johnson, who preferred national standards, and Senator Muskie, who wanted to retain the prerogative of the states to set standards when they were willing to do so.

This pattern of incremental development was shattered by the bold assertion of national leadership in the *Clean Air Act Amendments of 1970* and the *Water Pollution Control Act Amendments of 1972*. Rather than adding a small expansion of federal enforcement pow-

Figure 3-3

Policy Evolution in Federal Air and Water Pollution Control Legislation

Year	Legislation	Federal Role
	WATER POLLUTION LEGISLATION	
1948	*Water Pollution Control Act* (PL 80–845)	Research, technical assistance loans
1956	*Water Pollution Control Act Amendments* (PL 84–660)	Grants for treatment plant construction; Enforcement conferences and court action authorized against individual dischargers
1961	*Federal Water Pollution Control Act Amendments* (PL 87–88)	Federal jurisdiction extended to navigable waters; authorization for grants increased
1965	*Water Quality Act* (PL 89–234)	Federal-state standard setting; authorization for grants increased
1966	*Clean Water Restoration Act* (PL 89–753)	Increased grant authorizations
1972	*Water Pollution Control Act Amendments* (PL 92–500)	Federal effluent standards; federal-state permit system; state waste management plans required; increased authorizations for waste treatment facility grants
	AIR POLLUTION LEGISLATION	
1955	*Air Pollution Control Act* (PL 84–159)	Research, training, demonstrations
1963	*Clean Air Act* (PL 88–206)	Enforcement conferences and federal suits authorized in cases of interstate and local control agencies
1965	*Motor Vehicle Air Pollution Control Act* (PL 89–272)	Federal regulation of emissions from new motor vehicles
1967	*Air Quality Act* (PL 90–148)	Federal-state standard setting for air quality control regions
1970	*Clean Air Act Amendments* (PL 91–604)	National emission standards; state implementation plans for administration and enforcement of national standards required

Source: ACIR, *Protecting the Environment*, pp. 31–32.

ers to an increase in pollution control authorizations, these programs established ambitious new environmental standards within a complex new administrative framework. For instance, according to the *Clean Air Act*, each state must submit an implementation plan for adopting, maintaining, and enforcing *national* air quality standards. If it refuses, the Environmental Protection Agency (EPA) will prepare the plan for the state. It is the responsibility of each state to enforce its plan and, if it does not, EPA will. In states that comply with the law, the federal government will pay between one-half and two-thirds of the cost of administering the program. The *Water Pollution Control Act* included similar provisions, indicating that a new class of "commandeering" or "conscriptive" partial preemptions was developing.[99]

Passage of these tough new acts was made possible in part because the "environment had blossomed as a big issue—the big issue—and everyone wanted a piece of the action."[100] According to one account, the groundswell of public interest in environmental protection that arose in the late 1960s had "undeniable aspects of a moral crusade with powerful emotion, even religious under-currents."[101] Even President Nixon, who was reluctant philosophically to regulate the private sector, proposed setting national air quality standards. Sen. Muskie was heavily criticized in Ralph Nader's *Vanishing Air* for the 1967 legislation that many considered completely unworkable. The Nader report charged that Muskie's opposition in 1967 to Johnson's plan for national standards had severely thwarted the effort to control pollution.

This public and interest group support was translated into strong legislation. For example, Sen. Muskie reversed his protective stance toward state prerogatives and advocated legislation even stronger than the Administration proposed. Although lobbying was vigorous on both sides of the issue, media attention put industry's position in jeopardy:

> Heavy press coverage of the Muskie proposals, coupled with intense public interest, almost ensured that very little modification would result from the Conference Committee meetings. It seemed clear that any attempt to significantly change the Senate language would brand the politician responsible as a puppet of industry.[102]

In fact, the establishment of national standards was not strongly opposed even by industry lobbyists, for by that time many business executives had decided that a single national standard for each pollutant was probably preferable to 50 different state standards.

A somewhat similar scenario spurred enactment of the water pollution bill in 1972, although President Nixon eventually vetoed this bill, primarily because of its escalating price tag. In addition, Sen. James L. Buckley (CON.-NY) expressed reservations regarding the role of the states under the legislation:

> ... despite the pious references to the primacy of the state role in water quality efforts, it may well threaten in too many instances to reduce the role of the states and local governments to that of "errandboy," so that the bill may, in fact, encourage states to withdraw from the national effort.... The federal government cannot possibly ... administer this program without the active cooperation of the states. And I question whether competent state officials will approach their responsibilities with dedication and enthusiasm, if their every act is subject either to prior approval or subsequent review by the Administration.[103]

Nevertheless, the President's veto was easily overridden and the 1972 bill became law. Some observers have since argued that this was the first time that state actions had ever been subject to such complete federal control.[104]

PATTERNS IN OTHER RECENT PROGRAMS

It was not to be the last time such controls were imposed, however. The partial preemption mechanism became the instrument of choice for an unprecedented range of energy and environmental legislation enacted in the 1970s. Some programs followed the pattern evident in air and water pollution, building regulation upon an earlier foundation of federal grants research and related federal policies. Based on air and water pollution programs, one group of scholars concluded that federal policy tended to evolve through four stages in developing a regulatory presence:

1) Federal entry into a policy area is a last resort, generally concluding a long legislative history in which states have been provided several incentives to exercise authority over a problem area;
2) National legislators generally distrust the states' willingness and/or ability to exercise sufficient control over problems;
3) Federal entry into a problem area begins a process of continued and increasing federal usurpation of previously state prerogatives; and
4) States often retain some responsibility for implementation of public policies, but are effectively shut out of policy formulation functions.[105]

In contrast, other environmental programs enacted in the 1970s adopted the partial preemption technique relatively early in their policy development cycle. Naturally, very few federal programs of significant size simply spring into existence without some prior federal activity. But several of the 1970's environmental enactments greatly abbreviated the process of developing from a small research or demonstration program into a major regulatory act. Although this process took 24 years in the case of water pollution legislation, only 11 years elapsed between enactment of the research and demonstration programs of the *Solid Waste Disposal Act of 1965* and the regulatory provisions of the *Resource Conservation and Recovery Act of 1976.* As one observer noted: "While the evolution of solid waste control is a mirror image of early air and water control, it reflects . . . a greatly accelerated pace."[106]

Other recent environmental programs made similar leaps from a modest national role to comprehensive regulation. Prior to the passage of the *Safe Drinking Water Act of 1974*, federal involvement in this area was limited to overseeing water purity on interstate carriers and assisting in control of water-borne communicable diseases. State and local governments had been preeminent in establishing the nation's drinking water systems. Yet Congress turned immediately to the partial preemption approach in enacting the *Safe Drinking Water Act*, which established national drinking water standards, mandated local compliance procedures, and authorized a state enforcement role.[107] No incremental process of federal demonstration or incentive grants was attempted prior to this to deal with drinking water problems, nor was a more limited and targeted approach attempted. Similarly, there was no federal mining reclamation legislation prior to the enactment of the *Surface Mining Control and Reclamation Act* in 1977.[108]

Thus environmental policymaking in the mid-1970s increasingly departed from the earlier pattern of incrementalism in favor of a process of policy diffusion. Policymakers seized upon partial preemption at an early stage in many recent environmental programs, rather than utilize this approach at the culmination of a long period of federal involvement.

Direct Orders

Statutory direct orders most closely resemble the common conceptualization of a federal mandate. Under this mechanism, federal regulation takes the form of direct legal orders that must be obeyed under threat of civil or criminal penalties. Despite their apparent legal simplicity, the number of statutory direct order mandates is surprisingly limited. The primary examples include the *Equal Employment Opportunity Act of 1972*, which extended the prohibitions against discrimination in employment contained in the Title VII of the *Civil Rights Act of 1964* to state and local government employment; the *Fair Labor Standards Act Amendments of 1974*, which extended the prohibitions against age discrimination of the *Age Discrimination in Employment Act of 1967* to state and local government employment; and the *Public Utilities Regulatory Policy Act of 1978* (PURPA), which established federal requirements concerning the pricing of electricity and natural gas. An additional direct order requirement of the *Fair Labor Standards Act Amendments of 1974*, extending federal minimum wage and overtime coverage to state and local governments, was subsequently overturned by the Supreme Court in *National League of Cities v. Usery.*[109]

The factors responsible for the relative dearth of direct order mandates appear to be several. To begin with, federal policymakers tend to pattern new regulatory initiatives after available precedents rather than to formulate them anew. Not only were the crosscutting requirements and partial preemption techniques firmly established prior to enactment of the direct orders listed above, but the former mechanisms appeared to resemble more closely the traditional methods of cooperative federalism. In addition, political and Constitutional constraints appear to have hampered enactment of certain direct order regulations. Although existing court interpretations place almost no restraints on intergovernmental regulation under the Congressional spending power, the Supreme Court's overturning of a direct order mandate in the *NLC* decision placed a tangible cloud of uncertainty around this regulatory approach that has been pierced by few subsequent enactments.[110] In addition, the Congressional Budget Office observes that "Congress has rarely passed laws mandating state and local government activities . . . for political reasons."[111] Certainly Congress appeared hesitant in adopting most existing direct order mandates. PURPA was enacted in a rather tentative form, mandating in Titles I and II that state public utility commissions simply consider the adoption of federal pricing standards.[112] Each of the remaining direct order provisions, extending federal minimum wage laws and prohibitions against racial, gender and age discrimination to state and local government employment, represented amendments to existing federal laws that specifically exempted state and local governments from coverage. On the other hand, actual adoption of the direct order mechanism in most of these cases tended to arouse only modest overt political opposition.

TITLE VII

The 1972 extension of the prohibition against racial and sexual discrimination in employment set forth in Title VII of the *Civil Rights Act of 1964* illustrates this expansionary process. As initially enacted, Title VII applied to almost the entire private sector in the United States, but state and local governments were specifically exempted from such coverage, along with teachers, federal government employees, and employees of small businesses and labor unions with less than 25 workers. One study of the issue observed that Title VII's legislative history "offers little insight into the reasons for this exemption."[113] However, this exclusion was consistent with other provisions of Title VII which deferred to state and local prerogatives. For example, an aggrieved party could not sue an employer under Title VII until appropriate state and local remedies had been exhausted.[114] Because Title VII had been patterned after state fair employment practices legislation, Congress required that the federal Equal Employment Opportunity Commission relay complaints to state commissions, which exist in nearly all states, and defer action for sixty days to allow them to address the problem under state law.[115]

This cooperative administrative mechanism was retained when Title VII was amended in 1972, but the posture of intergovernmental deference was eroded when Congress expanded the law's coverage to include state and local government employees along with federal workers and a variety of smaller private firms. If the rationale for the original exemption was not made explicit, Congress clearly detailed its reasons for extending coverage. Coverage of the roughly 10 million employees of subnational governments was critically needed and "long overdue" according to the report of the House Committee on Education and Labor.[116] In reaching this conclusion, the Committee cited a report of the U.S. Civil Rights Commission which declared:

> State and local governments have failed to fulfill their obligation to assure equal job opportunity. . . . Not only do [they] consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job.[117]

Addressing such problems through federal legislation was clearly permissible under the 14th Amendment, observed the Committee report.

Accordingly, the extension encountered relatively little opposition. House Republicans on the Education and Labor Committee criticized the move, claiming that it would exacerbate the "already swollen workload" of the EEOC and it would be "inconsistent with our [federal] system":

> If [the] jurisdiction is thus extended, we will have the anomaly of a federal administrative agency interposing itself in the internal jurisdiction of state and local government.[118]

This extension was not the Republicans' main concern with the legislation, however; the bulk of their complaints was directed at other provisions. An effort to delete this provision from the bill also failed in the Senate, in part because the Nixon Administration accepted the extension.[119]

FAIR LABOR STANDARDS ACT AMENDMENTS

Two additional direct orders were enacted in the mid-1970s as part of a general extension of the *Fair Labor Standards Act* (FLSA). One extended coverage of the act's minimum wage and overtime provisions to state and local employees, while the other placed state and local governments under the *Age Discrimination in Employment Act* (ADEA). Although both regulations were subject to legal challenges, the judicial outcomes were very different. The extension of FLSA to state and local governments was overturned by the Supreme Court in *National League of Cities v. Usery*, while the constitutionality of the ADEA was recently upheld in *EEOC v. Wyoming*.

Wage and Overtime Provisions

FLSA was first enacted in 1938 to regulate minimum wages, overtime hours and certain other working conditions in firms engaged in interstate commerce. State and local government employees and various other workers initially were excluded from coverage. Overtime, however, coverage of the act was gradually expanded to additional sectors of the private economy and the federal minimum wage was periodically increased. In 1966, for example, the act was expanded to cover workers engaged in the agricultural processing industry and to local government employees in public hospitals, local transit operations, and in schools and colleges. This extension was subsequently challenged by the state of Maryland and upheld by the Supreme Court in *Maryland v. Wirtz.*[120]

The *1974 Fair Labor Standards Act Amendments* again raised the minimum wage and further expanded coverage of the act to include an additional 5 million federal, state, and local government employees. Little justification was given for this extension, but the House committee report on the legislation suggested that state and local governments would be little affected by the change because their wage rates were already relatively high and most working hours were already in compliance.[121] It also observed that a similar extension had been upheld by the Supreme Court in the *Wirtz* decision. Nevertheless, the legislation encountered substantial opposition in Congress. The Nixon Administration opposed numerous aspects of the legislation, calling the extension of FLSA coverage to state and local governments "an unnecessary interference in their prerogatives."[122] Particular objections were raised to the effects of FLSA's overtime pay requirements on police and fire salaries although defenders of the provision argued that "policemen and firemen are workers, just like other workers."[123] An effort was made to delete this portion of the coverage in the Senate, but it was defeated by a vote of 29 to 65. When the provision was eliminated by the House, however, President Nixon proceeded to sign the legislation.

Two years later this portion of the act was judged unconstitutional by the Supreme Court in the well known case of *National League of Cities v. Usery.* Reversing its earlier position in the *Wirtz* decision, the majority on the Court declared that:

> Congress has attempted to exercise its commerce clause authority to prescribe minimum wages and maximum hours to be paid by the states in their capacities as sovereign governments. ... This exercise of Con-

> gressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by article 1, section 8.[124]

As a result, one of the principal direct orders enacted by Congress in the 1970s was overturned.

Age Discrimination

The second direct order contained in the *Fair Labor Standards Act Amendments of 1974* amended the *Age Discrimination in Employment Act* (ADEA) to include coverage of state and local government employees. Although this provision also was challenged in the courts, its legality was recently upheld by the Supreme Court.

As in the programs above, state and local governments were not covered in the original ADEA passed in 1967. Little justification was given in the legislative history for either the initial exclusion of state and local governments from the scope of the ADEA or the subsequent reversal of this policy. The House Committee on Education and Labor explained it simply as "a logical extension of the committee's decision to extend FLSA coverage to federal, state and local government employees."[125] Unlike the expansion of FLSA itself, however, this provision provoked little political controversy. President Nixon supported extension of the ADEA and declared in a Presidential message in 1972 that "especially in the employment field, discrimination based on age is cruel and self-defeating."[126] Facing little opposition, it was enacted into law.

Following the *NLC* decision in 1976, however, the ADEA's application to state and local governments also came under legal challenge. Since both FLSA and the ADEA were initially established to deal solely with the private sector, Congress acted under the authority granted to it through the commerce clause. Because the Supreme Court denied Congress' authority to regulate state and local wages and hours under the commerce power, various jurisdictions have questioned the extension of the ADEA on this basis as well. Initial court decisions on this issue were mixed. Several lower courts ruled that, in spite of *NLC*, Congress intended to exercise its power to regulate the states under Section 5 of the 14th Amendment.[127] The U.S. District Court for Wyoming, however, concluded that Congress did not act pursuant to the 14th Amendment in extending the ADEA to state employees, and it ruled that ADEA's application to a Wyoming statute on mandatory retirement violates the 10th Amendment.[128] In a decision that apparently limits the scope of the *NLC* decision, the Supreme Court ruled on March 2, 1983 that the ADEA constitutes a permissible exercise of the commerce power and upheld the constitutionality of the act.[129]

PURPA

Another significant direct order enacted in the 1970s was established by the *Public Utility Regulatory Policies Act of 1978* (PL 95–617). In its final form, PURPA required that state utility regulatory commissions consider adopting a variety of electrical energy pricing and conservation measures. Consequently, it marked a substantive departure from the regulations examined above which dealt with the rights and working conditions of government employees. Politically, however, passage of the act resembled the earlier pattern of initial Congressional reluctance to engage in direct mandating of state and local policies. In fact, PURPA encountered more active political opposition in Congress than any of the above direct orders, and it was substantially modified prior to passage.

Originally, a much bolder version of what eventually became PURPA was included as one element in President Carter's comprehensive energy policy proposals of 1977. The Carter Administration proposed that state utility commissions be required to follow certain minimum federal standards in their regulation of electric power rates and usage. Specifically, utility companies would be required to base charges on the actual cost of electricity provided, eliminating rate advantages for heavy users. Utilities would also be required to establish discounts for electrical rates during off-peak hours, inexpensive "lifeline" rates to the poor and elderly would be encouraged, and public utility advertising would be discouraged.[130] Since practically the entire energy policy was rushed through the House, these provisions were passed by that chamber in 1977 in much the same form as the President proposed them.

The proposals were treated far less favorably in the Senate, however. As *Congressional Quarterly* observed, the Senate Energy and Natural Resources Committee "purposely dropped from the measure virtually all of Carter's far-reaching initiatives."[131] In place of the mandatory standards in the House legislation, the Senate bill emphasized a federal assistance role, establishing a federal research institute to assist state regulatory agencies in their pricing decisions and allowing the federal government to participate in state rate-setting proceedings as an advocate. Explaining these modifications, Sen. J.Bennett Johnston (D-LA) called the Administration's proposal "a radical extension of federal authority into the highly complex matter of the design of retail rates for electricity." "The committee record," he concluded, "clearly showed that at present there is no clear justification for such an extension of federal authority."[132] Two amendments to strengthen the committee measure on the Senate floor were soundly defeated.

The final version of the legislation represented a partial compromise between the different bills. The federal rate-setting standards favored by the Administration and accepted by the House were included in the legislation, but state utility commisions were required only to consider adopting them. If they failed to do this, the federal Energy Department could intervene and specifically request that the state commission consider the standards. In addition, an annual report was required from each state utility agency detailing the progress made toward considering the standards, and state agencies were required to implement federal rules promoting cogeneration of electric power by small producers. Although actual mandating of most rules and standards was diminished in the final bill, PURPA has still been called "the first successful intrusion by the federal government into the arena of state regulation of retail electric rates."[133] As one observer noted, "the camel's nose is under the tent."[134]

In summary, then, Congress has evidenced a clear reluctance to enact mandatory direct orders to state and local governments. Relatively few have been established to date, although the list would appear longer if federal court orders were considered, along with direct order provisions contained in certain partial preemptions. Significantly, state and local governments were exempted from the original fair labor standards, age discrimination, and Title VII legislation, and political constraints were clearly evident in the adoption of PURPA. Moreover, legal constraints on federal direct order mandates based upon the commerce power have become apparent in overturning the FLSA amendments and in legal challenges to the ADEA.

In response, Congress has relied heavily on less patently coercive and more established instruments of regulation such as partial preemptions and crosscutting requirements. But the history of rapid regulatory growth in recent years suggests that direct order mandates will not remain a dormant field if a slackening of legal and political constraints should occur. Despite its initial reluctance to do so, Congress easily extended Title VII, FLSA, and ADEA coverage to state and local governments once these laws were applied to the private sector.

THE POLITICS OF INTERGOVERNMENTAL REGULATORY GROWTH

In the public mind today, the source of government regulation may be thought to lie most often with the federal bureaucracy. Even influential scholars have identified "the motivational structure of governmental bureaucracy as the primary source for that part of governmental growth that does not represent response to the demands of citizens."[135]

But the diverse origins of the programs examined in this chapter seem to belie any simple explanations of regulatory growth, particularly theories that fail to explain why intergovernmental regulatory mechanisms grew so suddenly in recent years. Although the bureaucracy has obviously played a central role in the promulgation of standards and requirements implementing regulatory statutes, the cases studied in this chapter reveal no examples of bureaucratic empire building at the legislative stage of the regulatory process. Congress played a more important role than is commonly assumed, but no single actor in the governmental system emerged in these studies as preeminently responsible for the expansion or development of federal intergovernmental regulation. As James Q. Wilson has observed: "What is striking about the origins of . . . regulatory programs is that in almost every case, the initial law was supported by a rather broadly based coalition."[136]

The tendency for regulations to attract broad support in their initial passage is only one finding to emerge from this chapter. Despite the variations found in the politics of individual regulations, the enactments studied here were not a series of random events. Rather, they suggest a sequence of conclusions about the basic patterns of regulatory growth:

- Most of the regulations studied in this chapter involved the use of federal grants to state and local governments, or they affected functions and activities traditionally within the orbit of state responsibilities. In many cases, related regulations had been initiated at the state level prior to the federal legislation.
- The initial enactments using each of the four regulatory mechanisms examined tended to encounter serious and prolonged opposition in the legislative process.
- These early regulations often were developed in response to perceived failures of less intrusive federal measures to achieve their goals.
- Once a regulatory instrument has been successfully established in a given field of policy, there has been a tendency for other programs in that field to duplicate its use.
- The most openly coercive forms of intergovernmental regulation—crossover sanctions and direct orders—have been adopted much less frequently than seemingly more cooperative regulatory instruments—crosscutting requirements and partial preemptions.
- Finally, state and local officials generally have been ineffective in opposing new intergovernmental regulations. Often they have supported the goals of regulations. In other cases, they have focused their attention on grant benefits provided by many regulatory programs, overlooking the adverse consequences of the program as a whole.

Collectively, these generalizations outline the process through which the federal government became involved in intergovernmental regulation. Examined in detail, they help to highlight, first, the circumstances that favored the development of intergovernmental regulation and, second, the dynamics by which intergovernmental regulation was developed and diffused.

Preconditions to Intergovernmental Regulation

As indicated earlier in this chapter, the pervasive atmosphere of governmental activism prevailing in the 1960s and 1970s formed the broad political context in which intergovernmental regulation grew and developed. It is clear from the case studies that the four political factors previously identified as contributing to the growth of federal regulation overall—supportive public opinion, emergent interest groups, budgetary constraints, and changes in Congress—played important roles in enacting several intergovernmental regulations. Similarly, the "green light" given to intergovernmental regulation by the courts emerges clearly from the case studies. Apart from one or two direct order mandates, there were practically no cases of successful legal challenges to the new federal regulation of state and local governments. On the contrary, the stimulus for creating certain federal regulations, such as those in bilingual and handicapped education, came directly from the courts themselves, not to mention the variety of court-imposed mandates dealt with in *Chapter 2*.

The most important factor establishing a favorable climate for intergovernmental regulation, however, was the elaboration and expansion of the federal grant system. The pervasive growth of federal grants-in-aid accustomed both federal policymakers and state and local officials to engage in combined operations wherever possible. Once this pattern was established and made familiar in assistance programs, it was only a short conceptual leap to think of placing federal regulations in this mold as well—especially in the many areas where states possessed distinctive competence and experience.

Indeed, two of the forms of intergovernmental regulation—crossover sanctions and crosscutting requirements—are inherently connected to the grants system because they regulate the use of federal aid monies. As such, they represent a new stage in a long term trend toward increasing federal control over grant-in-aid funds. The first strings placed on federal grants were simply auditing standards designed to assure basic fiscal and legal accountability in the use of funds. Later standards included planning and other provisions intended to assure that funds would be used effectively as well as legally. As the federal government invested more and more funds in state and local governments, however, federal policymakers appeared to feel justified in exerting even greater influence over the use of those funds. There was a seemingly irresistible temptation to do as many good things as possible with every grant dollar—to get "more bang for the buck." Thus, crosscutting requirements and crossover sanctions were developed to leverage limited funds into serving several different goals.[137] Whereas earlier requirements were specific to each program, these newer forms affected many different grants at once.

A somewhat different pattern of relationship to federal grants was apparent in the partial preemption programs. Many partial preemptions developed out of earlier grant programs, often in response to the failure of such subsidies to achieve their goals. Preoccupied with federal aid flows, state and local officials rarely opposed these often dramatic extensions of federal authority with any degree of unanimity. They tended to focus their attention on funding levels rather than on the sometimes subtle accumulation of new regulatory provisions, or else they accepted promises of federal aid as compensation for initial regulatory intrusions.

This failure of state and local officials to effectively oppose the development of many programs utilizing new techniques of intergovernmental regulation was only one element in the political process that generated them. Overall, the pattern of initiating these new mechanisms was marked by initial difficulties in overcoming political constraints to intergovernmental regulation, followed by an often rapid diffusion of each newly acquired regultory instrument to additional program and policy areas.

The Breakdown of Constraints On Intergovernmental Regulation

The dramatic growth of federal intergovernmental regulation was largely unanticipated, and even once the process had begun, it often went unrecognized. Except for ordinary grant conditions, federal regulation of state and local governments was virtually nonexistent before the 1960s. Most observers at the time questioned its political and legal viability. The Kestnbaum Commission, for example, assumed that "neither level of government may place burdens on the other."[138] More specifically, it noted that "the national government is generally not allowed to impose mandatory duties on state and local officials."[139] Believing that federal regulation of state and local governments would not become an issue, the commission limited its discussion of regulatory topics to conditions justifying total federal preemption of entire regulatory fields, such as interstate communications and transportation.

Given such humble origins, it is not surprising that the growth of federal intergovernmental regulation was tentative at first, marked by gradual erosion of political constraints to regulation. It was not always recognized that these techniques of regulation were genuinely new and different, but they were widely perceived to be unusually intrusive.

For example, the principle of nondiscrimination in using federal funds was urged for several years before it was enacted in the form of Title VI. Even liberals like President Kennedy were dubious of the merits and legality of such a regulatory approach. It was successfully enacted only in the wake of President Kennedy's assassination, driven through Congress by a skillful new President on a crest of enormous popular support for stronger civil rights legislation. The passage of Title VI was furthered also by the Constitution's explicit provision for federal regulation of the states in the area of civil rights and by the fact that the policies of many states were completely bankrupt on this issue.

The reputation earned by states on civil rights spilled over into other areas of policy and eroded the legitimacy of the states' rights concept generally as a barrier to federal regulatory interventions. This erosion was somewhat ironic given the record of state leadership in many of the fields eventually subject to intergovernmental regulation. Various states pioneered in the areas of handicapped education and certificate-of-need requirements. Many states had on-going pollution and equal employment programs in place prior to federal regulation. Such innovations were often overlooked by the public, however, even though some formed models for subsequent federal legislation. In the aftermath of civil rights, public and Congressional attention tended to focus on the failures of various states to adequately control pollution and rising health costs or to fully educate handicapped students.[140] Dissatisfied with state progress on such issues, Congress attempted to redress such problems rapidly, on a national scale, rather than wait perhaps years for innovative programs in these fields to diffuse to other states.

This process did not mean that the first programs containing the other new mechanisms of intergovernmental regulation were easily established, however. Initial enactments utilizing each new device continued to face political difficulties. A regulatory approach to highway beautification took ten years to accomplish, and even the 1965 legislation had less stringent sanctions than President Johnson had requested. The first direct order was passed in an extension of Title VII of the *Civil Rights Act* in 1972, eight years after the initial law exempted state and local governments from its coverage. Finally, many of the first uses of the partial preemption technique grew slowly out of earlier federal grant and demonstration programs, although a few represented long sought-after expansions of older, federally-administered programs into areas of interstate commerce. In the case of air pollution legislation, for example, the first proposals advocating federal regulation and standard-setting were rejected by Congress. Federal air pollution regulation was enacted only after weaker programs were severely criticized and a stronger federal role attracted popular support.

In summary, the first programs utilizing the four instruments of intergovernmental regulation were enacted gradually, often overcoming stiff opposition. These programs generally required strong presidential support, and sometimes the appearance of a public policy crisis, to ensure passage. Each was the object of considerable political controversy. In every case, the development of a new regulatory device was prompted in part by a dual sense of failure—first on the part of many states and, second, on the part of existing, less coercive federal programs.

It is this process of gradual regulatory buildup that Bardach and Kagan call "the logic of regulatory expansion":

> The natural tendency to follow things to their logical conclusion [is a] powerful engine of regulatory expansion.... The logic of meeting original goals, with its progession toward more costly, detailed, and intrusive forms of regulation, is manifested clearly in pollution control regulation ... [and] applies to other regulatory spheres as well.[141]

There is no question that many of the programs examined in this chapter were passed in the belief that federal objectives might finally be realized if only a more stringent regulatory stance were adopted.

The Diffusion of Intergovernmental Regulations

Once the new regulatory instruments became established, the politics of regulation began to change, sometimes dramatically. In contrast to the pattern of gradual adoption characterizing initial enactments, later programs often were adopted with little opposition. Once an instrument gained a foothold in a given field of policy, it tended to spread rapidly to other programs in that field.

Two basic factors help to explain this process of regulatory diffusion. The first concerns the erosion of what James Q. Wilson calls "legitimacy barriers" to federal program expansion. Many initial federal programs, he observes, were bitterly contested in the political arena, with opponents challenging the very idea of federal penetration into previously untouched policy areas. But once such challenges were overcome and a federal program was established, the issue of legitimacy tended to evaporate, rarely to reemerge. As Wilson describes it, the process of program enactment often changed considerably:

> Once the initial law is passed, the issue of legitimacy disappears.... Political conflict takes a very different form. New programs need not await the advent of a crisis or an extraordinary majority, because no program is any longer "new"—it is seen, rather, as an extension, a modification, or enlargement of something the government is already doing.[142]

A similar process was evident in the cases reviewed in this chapter. The vigorous opposition confronting the first attempts to use each new regulatory instrument rarely was repeated in subsequent attempts to employ the technique. In their conclusions on the growth of federal pollution control legislation, for example, Davies and Davies practically echo Wilson's refrain:

> Once the federal government has ventured into a new field, the pace of legislation is likely to accelerate. The initial hurdle of federal responsibility having been overcome, the search for more effective ways of accomplishing the task begins. Over the past ... ten years a large number of proposals designed to improve or expand pollution control have been introduced in ... Congress, and several major proposals have become law.[143]

A second factor influencing the changing character of regulatory politics might be called the "Kon Tiki principle." It emphasizes the relative ease in most human endeavors of copying or adapting an existing model or activity compared to inventing a totally new one from scratch. Anthropologists have long recognized this tendency in studying the diffusion of technologies among different societies. Similarly, in many of the policy fields examined here, policymakers exhibited little interest in reinventing the regulatory wheel. Models of new regulatory techniques were readily available—and they were readily seized upon.

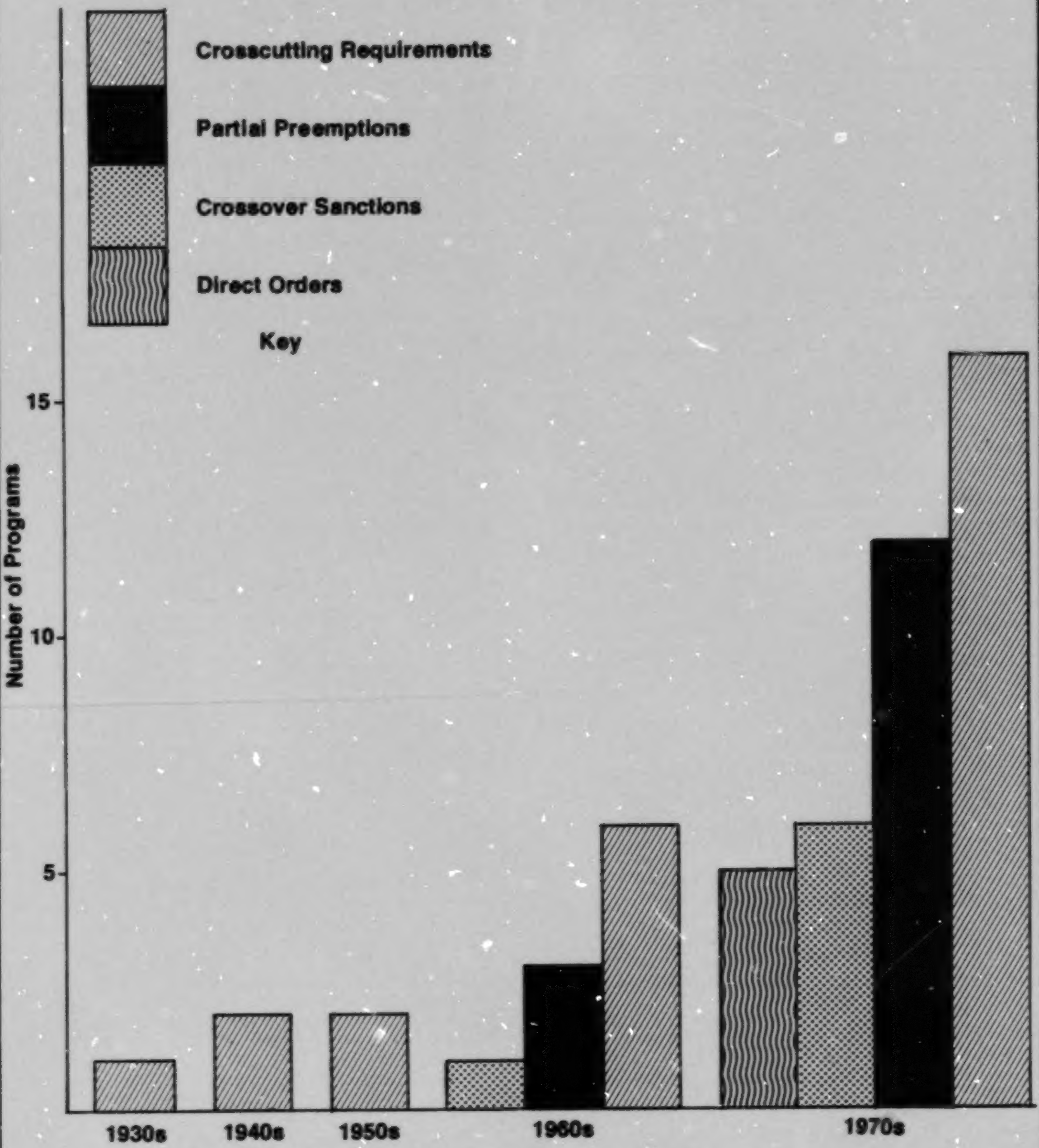
This process of diffusion was especially noticeable in the spread of crosscutting requirements in the civil rights field and of partial preemptions in environmental protection. Congress typically gave little consideration to the consequences of applying these new regulatory techniques in distinctive program areas, nor did it consider the cumulative implications of regulatory proliferation. According to Gary Bryner, the diffusion of new regulations often resembled a process of logrolling, characterized by congressional unwillingness to establish regulatory priorities:

> Congress, as it has done in other areas, refuses to make difficult choices [in civil rights policy], finding it easier to extend benefits to all who demand it [sic] rather than limit the effort of government on behalf of one group.[144]

Although Presidents often led the drive to enact the earliest intergovernmental regulations, no such pattern of presidential leadership was present in the later stages of regulatory proliferation. At the same time, few of the subsequent regulatory enactments encountered active presidential opposition, even under the Ford and Nixon Administrations which sought to decentralize grant-in-aid programs. These two Presidents often advocated less stringent regulations, but they rarely opposed the general purposes or the thrust of new regulatory initiatives. The case studies are replete with examples of Republican presidential support and sponsorship for a variety of new regulatory programs, including NEPA, Clean Air, health planning, the 55 mph speed limit, and age discrimination legislation. In those few cases where Republican Presidents vetoed intergovernmental regulatory programs, this action almost always was prompted by grant-in-aid provisions in these programs, not by their regulatory components.

Graph 3-3

The Growth of Major Programs of Intergovernmental Regulation, By Type of Instrument, by Decade, 1930–80



Source: *Chapter 1, Appendix Table 1.*

Remaining Constraints on Federal Regulation of State and Local Governments

The process of rapid regulatory proliferation in the 1970s does not mean that the constraints on federal regulatory growth have been abolished entirely. Even during the period of most rapid growth, certain constraints remained evident in the distribution of new regulatory programs. *Graph 3–3* illustrates the accumulation of selected major programs of intergovernmental regulation over time, by period of enactment. Although the growing use of all forms of requirements is striking, it is clear that partial preemptions and crosscutting requirements have been most heavily used among the new assortment of intergovernmental regulatory techniques. These are also the two instruments that most closely resemble—at least superficially—standard practices of cooperative federalism. In contrast, the two techniques that are most openly coercive—crossover sanctions and direct order mandates—have been used less frequently.[145] The legislative histories of these techniques—especially in the case of direct orders—indicate that they encountered somewhat stronger political and legal obstacles en route to passage. Compounding these political problems, many crossover sanctions have proven unworkable in practice, as evidenced by the federal government's consistent unwillingness to impose fiscal sanctions for noncompliance.

Most recently, it appears that political constraints on the growth of all forms of intergovernmental regulation may be reemerging. Since 1979 there has been a sharp decline in the number of new regulations enacted, and the Reagan Administration has made regulatory reform and reduction a top priority. Regulatory retrenchment cannot be taken for granted, however. Over the past two decades, intergovernmental regulation has become an accepted policy instrument that appeals to policymakers across the political spectrum. Even in this period of political conservatism, proposals for new intergovernmental regulations have received serious attention on Capitol Hill, including a plan to withhold federal highway funds from states that fail to enact drunk driving legislation meeting federal standards and a proposal to cutoff federal housing programs in any community operating rent control. Based upon the record of the recent past, there is no basis for state and local complacency on the regulatory front.

FOOTNOTES

[1] Edward Koch, "The Mandate Millstone," *The Public Interest* (Fall 1980), p. 44.

[2] Murray Weidenbaum, *Business, Government, and the Public* (Englewood Cliffs, NJ: Prentice-Hall, 1977), pp. 15–16.

[3] Ronald Penoyer, *Directory of Federal Regulatory Agencies*, 3rd ed. (St. Louis: Center for the Study of American Business, 1981), p. 1.

[4] *Ibid.*, pp. 91, 92.

[5] Eugene Bardach and Robert Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982), p. 22.

[6] See for example, James Sundquist, *Politics and Policy* (Washington, DC: Brookings Institution, 1968), Chapter VI.

[7] Hazel Erskine, "The Polls: Pollution and Its Cost," *Public Opinion Quarterly* (Spring 1972), p. 120.

[8] Bardach and Kagan, *Going by the Book*, p. 23.

[9] James Q. Wilson, "The Politics of Regulation," in *The Politics of Regulation*, James Q. Wilson, ed. (New York: Basic Books 1980), pp. 370–71.

[10] See for example, David B. Truman, *The Governmental Process* (New York: Alfred A. Knopf, 1951).

[11] Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism: Restoring Confidence and Competence*, A–86 (Washington, DC: U.S. Government Printing Office, 1981), Chapter 2.

[12] See Wilson, "The Politics of Regulation," p. 385, and Jeffrey M. Berry, *Lobbying for the People* (Princeton, NJ: Princeton University Press, 1977), Chapter 3.

[13] Samuel Halperin, "Federal Takeover, State Default, or a Family Problem?" in *Federalism at the Crossroads: Improving Educational Policymaking*, ed. Samuel Halperin (Washington, DC: Institute for Educational Leadership, The George Washington University, 1976), p. 19.

[14] Thomas K. McCraw, "Regulatory Change, 1960–79, in Historical Perspective," in U.S. Congress, Joint Economic Committee, *Government Regulation: Achieving Social and Economic Balance*, vol. 5, *Special Study on Economic Change*, Joint Committee Print, 96th Cong., 2d sess. (1980), p.5. See also Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth* (Washington, DC: U.S. Government Printing Office, 1981), volumes 1–11.

[15] Recent sources that contrast the Congress of the 1950s and 1960s with the Congress of today include Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered* (New York: Praeger Publishers, 1977); Thomas E. Mann and Norman J. Ornstein, eds., *The New Congress* (Washington, DC: American Enterprise Institute for Public Policy Research, 1981);

Samuel C. Patterson, "The Semi-Sovereign Congress," in *The New American Political System*, Anthony King, ed. (Washington, DC: American Enterprise Institute for Public Policy Research, 1978), pp. 125–77; Timothy J. Conlan and Stephen L. Abrams, "Federal Intergovernmental Regulation: Symbolic Politics in the New Congress," *Intergovernmental Perspective* (Summer 1981), 19–26; and David B. Walker, Congress and the Reshaping of American Federalism," in *Congress and the Nation* (San Diego, CA: San Diego Union, 1980), pp. 9–13.

San Diego Union, 1980), pp. 9–13.

[16] Michael J. Malbin, "Commentary," *The Smith Kline Forum for a Healthier American Society* 3 (May 1981), p. 1.

[17] See Michael J. Malbin, "Delegation, Deliberation, and the New Role of Congressional Staff," in Mann and Ornstein, eds., pp. 134–77.

[18] Conlan and Abrams, "Symbolic Politics."

[19] David B. Walker, for instance, argues that during the 1970s there were two contrasting approaches to enacting legislation. When entirely new public issues were addressed, veto-group politics, delay, and traditional forms of coalition building were evident. When, however, new programs could be defended as simply renewals or reauthorizations of older programs, questions of legitimacy, overall direction, or impact were less frequently raised. See Walker, pp. 239–40.

[20] Roger H. Davidson, "Subcommittee Government: New Channels for Policy Making," in Mann and Ornstein, eds., pp. 131–32.

[21] 42 U.S.C. 2000d.

[22] Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (New York: Wiley-Interscience, 1969), p. 7. Much of the information on the enactment of Title VI is taken from Orfield's account.

[23] See V. O. Key, Jr., *The Administration of Federal Grants to States* (Chicago: Public Administration Services, 1937), pp. 156–62.

[24] It is important to note that these early denials were for noncompliance with conditions stipulated in the grant program in question. A crosscutting requirement differs from such conditions in that it is generally a separate piece of legislation applicable to many grant programs, but having no necessary connection to any one program. Thus, from the local perspective, the community may accept federal funds and begin a program, and only later discover that a new crosscutting requrement, totally unrealated to that program, has been enacted and must be complied with.

[25] Orfield, *The Reconstruction*, pp. 24, 29.

[26] *Ibid.*, pp. 25, 28.

[27] Arthur M. Schlesinger, Jr., *A Thousand Days* (Boston, MA: Houghton Mifflin Co., 1965), p. 952.

[28] Quoted in Orfield, *The Reconstruction*. p. 32.

[29] *Ibid.*, p. 33. See also James Sundquist, *Politics and Policy* (Washington, DC: Brookings Institution, 1968), pp. 259–71.

[30] *Ibid.*, p. 35.

[31] *Ibid.*

[32] *Congressional Record*, 88th Cong., 2d sess., March 30, 1964, p. 6543.

[33] Orfield, *The Reconstruction*, p. 41.

[34] U.S. Congress, Senate, Committee on the Judiciary, *Hearings, Civil Rights—The President's Program, 1963*, 88th Cong., 1st sess. (1963) p. 59, quoted in *ibid.*, p. 36.

[35] *Ibid.*, p. 42.

[36] See, Jeremy Rabkin, "Office for Civil Rights," in Wilson, *The Politics of Regulation*, p. 311.

[37] 42 U.S.C. 2000d–1.

[38] Orfield, *The Reconstruction*, p. 39.

[39] For example, Title IX reads in part: "No person in the United Staes shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." (20 U.S.C. 1681). Section 504 states: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (29 U.S.C. 794). The *Age Discrimination Act* states in part: "No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." (42 U.S.C. 6102). The comparable language from Title VI of the *Civil Rights Act* may be found above on p. 24.

[40] Bardach and Kagan, *Going by the Book*, pp. 19–21.

[41] See Edith K. Mosher, Anne H. Hastings, and Jennings L. Wagoner, Jr., *Pursuing Equal Educational Opportunity: School Politics and the New Activists* (New York: ERIC Clearinghouse on Urban Education, 1979), p. 11.

[42] Conlan and Abrams, "Symbolic Politics," p. 24.

[43] Steven Leon Abrams, "The Significance of Congressional Change for American Public Policy" (Honors Thesis, Harvard University, 1980), p. 30.

[44] See *ibid.*, pp. 33, 34.

[45] Martin L. LaVor, "Section 504 of the Vocational Rehabilitation Act," Memorandum to all Minority Members, House Education and Labor Committee, June 14, 1979, p. 1. Original emphasis.

[46] Rabkin, "Office for Civil Rights," p. 313.

[47] Conlan and Abrams, "Symbolic Politics," p. 25.

[48] Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* (Blommington, IN: Indiana University Press, 1976), p. 35. See also Advisory Commission on Intergovernmental Relations, *Protecting the Environment: Politics, Pollution, and Federal Policy* A–83 (Washington, DC: U.S. Government Printing Office, 1981).

[49] Steven Lewis Yaffee, *Prohibitive Policy: Implementing the Federal Endangered Species Act* (Cambridge, MA: MIT Press, 1982), p. 47.

[50] For a somewhat more detailed account of FERPA's passage, see Advisory Commission on Intergovernmental Relations, *The Evolution of a Problematic Partnership: The Feds and Higher Ed*, Report A–82 (Washington, DC: U.S. Government Printing Office, 1981), pp. 43-44.

[51] For more on the development of this and several other crosscutting procedural requirements, see Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A–52 (Washington, DC: U.S. Government Printing Office, 1977), Chapter 7.

[52] Conlan and Abrams, "Symbolic Politics."

[53] As evidence accumulates, others have begun to draw similar conclusions about regulatory politics. Yaffee concludes that the *Endangered Species Act* was "an extremely symbolic issue that fed public sentiment." Although "no one perceived any costs" when Congress enacted it, the law became mired in bitter controversies when attempts were made to implement it. See Yaffee, *Prohibitive Policy*, p. 57. Likewise, Jeremy Rabkin has written about "The distorted symbols . . . by which so much government policy has been made in the past few decades." He notes that normal legisla-

tive politics may be significantly altered "once the magic words 'civil rights' have been floated through a policy dispute." See Jeremy Rabkin, "Behind the Tax-Exempt Schools Debate," *The Public Interest* 68 (Summer 1982), p. 22. Robert J. Samuelson goes so far as to maintain that politics has become "The Science of Symbolism," which he defines as a process of "finding simpler substitutes for everyday complexities." Robert J. Samuelson, "The Politics of Symbolism," *National Journal*, July 24, 1982, p. 1308. See also James Q. Wilson, "American Politics, Then and Now," *Commentary* (Febraury 1979), p. 44.

[54] See *Table 1, Chapter 1.*

[55] PL 89–285.

[56] The 1966 figures were derived from Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the Federal System*, A-31 (Washington, DC: U.S. Government Printing Office, 1967), p. 283. The 1980 figures were calculated from U.S., Department of the Treasury, *Federal Aid to States: Fiscal Year 1980* (Washington, DC: U.S. Government Printing Office, 1981), p. 19.

[57] Sundquist, *Politics and Policy*, p. 341. This section rests heavily on his account.

[58] *Ibid.*

[59] *Ibid.*, p. 342.

[60] *Ibid.*, p. 343.

[61] *Ibid.*, p. 344.

[62] Congressional Quarterly, *Congress and the Nation*, vol. II: 1965–1968 (Washington, DC: Congressional Quarterly Service, 1969), p. 478.

[63] Sundquist, *Politics and Policy*, p. 374.

[64] *Ibid.*, p. 378.

[65] Congression Quarterly, *Congress and the Nation*, p. 477.

[66] *Ibid.*

[67] *Ibid.*

[68] See U.S., General Accounting Office, *Speed Limit 55: Is It Achievable?* (Washington, DC: U.S. General Accounting Office, 1977).

[69] *Ibid.*

[70] *Emergency Highway Energy Conservation Act*, PL 93–239.

[71] U.S. General Accounting Office, *Speed Limit 55*, p. 2.

[72] *Federal Aid Highway Amendments of 1974*, PL 93–643.

[73] U.S. General Accounting Office, *Speed Limit 55*.

[74] U.S. Congress, House, Committee on Public Works and Transportation, *Surface Transportation Act of 1978*, H. Rpt. 95-1485, 95th Cong., 2d sess., (1978), p. 45.

[75] *Surface Transportation Act of 1978*, PL 95–599, Section 205.

[76] Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M–122 (Washington, DC: U.S. Government Printing Office, 1980), p. 17.

[77] "Hospital Cost Control: Two Strategies," *Regulation* (January/February 1982), pp. 51, 52.

[78] For a detailed account of the bill's passage, see G. Gregory Raab, "National/State/Local Relationships in Health Planning: Interest Group Reaction and Lobbying," in *Health Planning in the United States: Selected Policy Issues*, Vol. 2; *Commissioned Papers for the Institute of Medicine* (Washington, DC: National Academy Press, 1981), pp. 105–29.

[79] See *ibid*.

[80] *Health Planning and Resources Development Amendments of 1979*, PL 96–79.

[81] *Ombibus Budget Reconciliation Act of 1981.*

[82] For more details, see R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington DC: Brookings Institution, 1983), chapter nine; and Richard Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," *Yale Law Journal* 86, p. 1207.

[83] For developments surrounding attempts to implement sanctions under the *Clean Air Act*, see *Chapter 4* of this study.

[84] Congressional Quarterly, *Congressional Quarterly Almanac, 1967* (Washington, DC: Congressional Quarterly Inc., 1968), p. 705.

[85] Mark V. Nadel, *The Politics of Consumer Protection* (Indianapolis, IN: Bobbs-Merrill, 1971), p. 209.

[86] Albert Nichols and Richard Zeckhauser, "Government Comes to the Workplace: An Assessment of OSHA," *Public Interest* 49 (Fall 1977).

[87] Advisory Commission on Intergovernmental Relations, *Protecting the Environment*, pp. 48, 49.

[88] See Harvey Lieber, *Federalism and Clean Waters: The 1972 Pollution Control Act* (Lexington, MA: D.C. Heath & Co., 1975), p. 64.

[89] See, for example, Congressional Quarterly, *1972 Congressional Quarterly Almanac* (Washington, DC: Congressional Quarterly, INC., 1973) pp. 934–44, and Congressional Quarterly, *1978 Congressional Quarterly Almanac* (Washington, DC: Congressional Quarterly, Inc., 1979), p. 697.

[90] Arthur W. MacMahon, *Administering Federalism in a Democracy* (New York: Oxford University Press, 1972), p. 57.

[91] Henry Lieber, *Federalism and Clean Waters*, p. 196.

[92] Mel Dubnick and Alan Gitelson, "Nationalizing State Policies," in Jerome J. Hanus, ed., *The Nationalization of State Government* (Lexington, MA: D.C. Heath, 1981), p. 66.

[93] This section relies heavily on Advisory Commission on Intergovernmental Relations, *Protecting the Environment: Politics, Pollution, and Federal Policy*, A–83 (Washington, DC: U.S. Government Printing Office, 1981). See also: Harvey Lieber, *Federalism and Clean Waters;* Richard B. Stewart, "Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy," *Yale Law Journal* 86 (1977): 1196–272; Sundquist, *Politics and Policy*, pp. 322–33, 345–55, 361–71; Charles O. Jones, *Clean Air: The Policies and Politics of Pollution Control* (Pittsburgh, PA: University of Pittsburgh Press, 1975); Alfred A. Marcus, *Promise and Performance: Choosing and Implementing an Environmental Policy* (Westport, CT: Greenwood Press, 1980); Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air* (New Haven, CT: Yale University Press, 1981); and Mel Dubnick and Alan Gitelson, "Intergovernmental Relations and Regulatory Policy," paper presented at Symposium on Regulatory Policy, Houston, TX, November 19–20, 1979.

[94] J. Clarence Davies III and Barbara S. Davies, *The Politics of Pollution*, 2nd ed. (Indianapolis, IN: Bobbs-Merrill Co., 1975), p. 26.

[95] *The Water Polution Control Act of 1948*, PL 80–845.

[96] Message of February 23, 1960, quoted in Sundquist, *Politics and Policy*, p. 323.

[97] Advisory Commission on Intergovernmental Relations, *Protecting the Environment*, p. 12.

[98] See Sundquist, *Politics and Policy*, pp. 363–65.

[99] See Lewis B. Kaden, "Politics, Money, and State Sovereignity: The Judicial Role," 79 *Columbia Law Re-*

view, p. 870; and Dubnick and Gitelson, "Nationalizing State Policies," p. 66.

[100] Advisory Commission on Intergovernmental Relations, *Protecting the Environment*, p. 23.

[101] Stewart, "Pyramids of Sacrifice," p. 1217.

[102] Advisory Commission on Intergovernmental Relations, *Protecting the Environment*, p. 23.

[103] U.S. Congress, Senate, Committee on Public Works, S. Rpt. 414 to accompany S 2770, 92nd Cong., 2nd sess. (1972), pp. 3763, 3767.

[104] See Lieber, *Federalism and Clean Waters*, p. 9.

[105] Timothy A. Hall, Irwin L. White, and Steven C. Ballard, "Western States and National Energy Policy: The New States' Rights," *American Behavioral Scientist* 22 (November/December, 1978), pp. 193–94.

[106] Advisory Commission on Intergovernmental Relations, *Protecting the Environment*, p. 29.

[107] PL 93–523.

[108] Hall, *et al.*, "Western States," p. 205.

[109] 426 U.S. 833 (1976). The *Voting Rights Act of 1965* can also be considered a direct order mandate. Because it is so unique, however—dealing with the process of elections rather than the delivery of government services—it has not been included here for study. Similarly, nonstatutory mandates stemming from federal court orders have also been excluded from this chapter, although they are reviewed in *Chapter 2*.

[110] See *Chapter 2* of this volume for additional discussion of these points.

[111] U.S., Congress, Congressional Budget Office, *Federal Constraints on State and Local Government Activities* (Washington, DC: Government Printing Office, 1979), p. 8.

[112] Section 210 of PURPA also requires that state utility commissions implement Federal Energy Regulatory Commission rules concerning small energy producers, but these requirements were written to impose few additional burdens.

[113] John P. Dean, "Title VII and Public Employers: Did Congress Exceed its Powers?" *Columbia Law Review* 78 (March 1978), pp. 374–75.

[114] Sundquist, *Politics and Policy*, p. 269.

[115] See Center for National Policy Review, *State Agencies and Their Role in Federal Civil Rights Enforcement* (Washington, DC: Center for National Policy Review, 1977).

[116] U.S. Congress, House, Committee on Education and Labor, *Equal Employment Opportunity Act of 1971, Report to Accompany HR 1746*, H. Rpt. 92–238, 92d Cong, 1st sess. (1971), in *U.S. Code, Congressional and Administrative News*, 92d Cong., 2d sess. (1972), p. 2154.

[117] U.S. Commission on Civil Rights, *For all the People ... By All the People: A Report on Equal Opportunity in State and Local Government Employment* (Washington, DC: U.S. Government Printing Office, 1969), quoted in *ibid.*, p. 2153.

[118] "Minority Views on HR 1746," in *ibid.*, p. 2173.

[119] Congressional Quarterly, *1972 Congressional Quarterly Almanac* (Washington, DC: Congressional Quarterly, Inc., 1973), p. 251.

[120] 392 U.S. 183 (1968).

[121] U.S. Congress, House, Committee on Education and Labor, *Fair Labor Standards Act Amendments of 1974, Report to Accompany HR 12435*, H. Rpt. 93–913, 93d Cong., 2d sess. (1974), in *U.S. Code Congressional and Administrative News*, 93d Cong., 2d sess. (1974), p. 2838.

[122] Congressional Quarterly, *1974 Congressional Quarterly Almanac* (Washington, DC: Congressional Quarterly, Inc., 1975), p. 241.

[123] *Ibid.*

[124] 426 U.S. 833 (1976).

[125] House Committee on Education and Labor, *Fair Labor Standards Act Amendments*, p. 2849.

[126] Quoted in *ibid.*

[127] See, for example, *Johnson v. Mayor and City Council of Baltimore*, (USDC MD), 49 LW 2819, 30 June 1981; and *EEOC v. County of Calumet*, (USDC Ewis), 49 LW 2819, 30 June 1981.

[128] *EEOC v. Wyoming*, (USDC WY), 49 LW 2767, 9 June 1981.

[129] *EEOC v. Wyoming*, 51 LW 4219, 1 March 1983.

[130] Congressional Quarterly, *1977 Congressional Quarterly Almanac* (Washington, DC: Congressional Quarterly, Inc., 1978), pp. 715, 721, 724.

[131] *Ibid.*, p. 738.

[132] *Ibid.*, p. 739.

[133] Claude Vaughan and James Sharpe, "The Public Utilities Regulatory Policy Act: Implications for Regulatory Commission Reform," *Public Administration Review* 41 (May/June, 1981), p. 388.

[134] *Ibid.*, p. 391.

[135] James M. Buchanan, "Why Does Government Grow?" in *Budgets and Bureaucracies: The Sources of Government Growth*, Thomas Borcherding, ed. (Durham, NC: Duke University Press, 1977), p. 18.

[136] James Q. Wilson, "The Politics of Regulation," p. 365.

[137] For a somewhat similar analysis of the "logic of available leverage," see Bardach and Kagan, *Going by the Book*, p. 21.

[138] The Commission on Intergovernmental Relations, *Report to the President for Transmittal to Congress* (Washington, DC: U.S. Government Printing Office, 1955), p. 66.

[139] *Ibid.* The commission noted only three exceptions to this rule, relating to the National Guard, the conduct of national elections, and the trying of certain federal cases in state courts.

[140] For example, Congressional reports supporting passage of the *Education For All Handicapped Children Act* apparently overestimated the number of handicapped students receiving an inappropriate education from the states. See U.S., General Accounting Office, *Unanswered Questions on Educating Handicapped Children in Local Public Schools* (Washington, DC: U.S. Government Printing Office, 1981), pp. 11, 12.

[141] Bardach and Kagan, *Going By the Book*, pp. 19, 20.

[142] Wilson "American Politics, Then and Now," p. 41.

[143] Davies and Davies, *The Politics of Pollution*, p. 26.

[144] Gary Bryner, "Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation," *Political Science Quarterly* 96 (Fall 1981), p. 413.

[145] It might be argued that certain partial preemptions that seek to "commandeer" state governments into serving federal purposes are equally coercive. Unlike ordinary partial preemptions in which the federal government administers a program if a state voluntarily declines to do so, this class of regulations resembles a direct order in that the federal government commands states to implement the program, providing little opportunity for voluntary withdrawal. Such provisions remain relatively rare, but they have been used in programs like the *Clean Air Act of 1970* and Section 210 of PURPA. Congressional reluctance to use this technique more frequently is consistent with Congress' overall tendency of favoring the less coercive forms of intergovernmental regulation.

Chapter 4

IMPLEMENTING FEDERAL INTERGOVERNMENTAL REGULATION

THE IMPLEMENTATION PROBLEM

"Implementation" is a major concern to analysts of American public policy. Though difficult to define precisely, the term refers to the process through which a statutory law, enacted by the Congress and signed by the President, becomes a tangible governmental service. Experts stress the need to distinguish between official intentions and real results. As one writer puts it, "policy is what governments *choose to do*. Implementation is what they *actually do*."[1] In between final passage and the final product is an elaborate administrative process, requiring the garnering of resources (including funds and personnel) and the establishment of procedures (forms, requirements, contact points). The focus of implementation analysis is here, on the stage between a decision and operations.[2]

Although political scientists have long studied questions of public administration, their interest usually revolved around such issues as departmental organization, budgeting systems, and the techniques of personnel management, and for the most part stressed *intra*-rather than *inter*-governmental relations. It is only in the past decade that the process of implementing federal programs has become an object of much close attention. This new interest was a natural outgrowth of the expansion of federal aid programs during the 1960s. For example, one of the earliest implementation studies focused on the initial operations of the landmark *Elementary and Secondary Education Act of 1965*.[3]

If one lesson has been learned from the growing body of research, it is this: *a lot can go wrong*.[4] Consistent with "Murphy's law," study after study has provided detailed documentation of programmatic shortcomings. The character of these findings is aptly illustrated by the subtitle of one prominent book in the field: "Why A Federal Program Failed."[5] A second, extremely influential study was similarly (but more elaborately) headed: "How Great Expectations in Washington Are Dashed in Oakland; or, Why It's Amazing that Federal Programs Work at All. . . ."[6] A third, more recent assessment bears the critical but hopeful title "Why Government Programs Fail: Improving Policy Implementation."[7]

Federalism as Obstacle

One unanticipated consequence of the new implementation research has been the development of a fresh perspective on federalism. As matters turn out, the system of legally independent state and national governmental jurisdictions—established nearly 200 years ago as a bulwark to our liberty—can sometimes be a serious impediment to the effective execution of centrally designed federal domestic programs. The multiplicity of levels means that many separate actors all must reach some sort of working agreement before positive results can be obtained. Their legal and political independence, rooted in our very constitutional framework, makes it quite likely that they never will. These facts make many implementation analysts skeptical about complex, nationally directed, intergovernmental schemes for social or governmental reform.

Public administrators have long recognized that the "chains of command" created within even a single governmental jurisdiction are seldom as tight as they might seem to an external observer. One major work stressed the difficulty that Presidents have in securing the faithful execution of orders by "their own" Cabinet departments and subordinate officials within the executive branch. Presidential power, Richard Newstadt declared, is actually only "the power to persuade."[8]

What implementation research adds to this perception is an appreciation of the many additional difficulties that obtain because of the multiplicity of participants and "decision points" in intergovernmental programs.[9] Carrying out a specific project often depends upon the involvement of more than one federal department or agency, a changing cadre of regional as well as headquarters staff, state officials, and a variety of actors from local governments as well as private or nonprofit sector organizations. One writer compares the implementation process to the children's game of "telephone," in which the original message tends to become increasingly garbled as it passes from player to player.[10] Furthermore, each of these participants is apt to have different objectives or at least differing priorities. There is no administrative hierarchy among the three governmental levels. Rather, each possesses an autonomous source of legal authority, as well as an independent bureaucracy and distinctive political constituency. Conflict therefore is as likely as cooperation. Although intergovernmental programs through the 1950s could be accurately characterized as creating a "partnership" for advancing common goals, most implementation analysts now present quite a contrary perspective. To Walter Williams, what the dramatic expansion of shared governance has actually produced is

> a most uneasy partnership. And it is a partnership in which the negative power of each partner to block or harass is much stronger than the positive power to move in desired directions.[11]

Most analysts appear to agree that both political and administrative accountability suffer from the separation of policymaking and administrative responsibilities which intergovernmental programs imply. On the one hand, as Martha Derthick has written, the "distance" of Washington from the local scene makes it hard for federal policymakers to know what must be done to achieve their objectives. As a consequence, they tend to set unrealizable goals:

> [S]eparation from local politics and administration gives federal policy

> makers a license to formulate ideal, innovative objectives, because the political and administrative burdens the innovations they conceive will be borne locally. They are free, much freer than local officials, to stand publicly for progress and high principle. Not having ordinarily to decide concrete cases, they do not have to make the compromises that such cases require.[12]

On the other hand, as Jerome Murphy has emphasized, federal officials also face major problems in assuring that local officials comply with their intentions and requirements. Thus, he writes,

> the federal system—with its dispersion of power and control—not only permits but encourages evasion and dilution of federal reform, making it nearly impossible for the federal administrator to impose program priorities; those not diluted by Congressional intervention can be ignored during state and local implementation.[13]

Together, these factors increase the probability of programmatic shortcomings and even failure while reducing the capacity to clearly fix responsibility for disappointing results. Although there may be blame enough to go around, on this issue (as many others) "where you stand depends on where you sit." Federal officials charge that their local counterparts are narrow-minded and overly responsive to the community "establishment." Locals see Washington as naive and impractical, too far away to appreciate their particular circumstances, and two-faced in its tendency to rush into programs that others must administer. Both levels view the other as constrained by bureaucratic procedures and more interested in spending money then in efficient management.[14] Because of the multiplicity of independent layers and actors, then, accountability is diffused and confused. Theodore Lowi and Benjamin Ginsberg charge that

> Federalism in the United States has become responsibility's escape route. Because of the federal structure of government and the institutional consequences that flow directly from that federal structure, when federal policies are carried out by those with local responsibilities, the policies become, as Swift would put it, "but a ball bandied to and fro, and every man carries a racquet about him to strike it from himself among the rest of the company."[15]

REGULATORY PROGRAMS: A NEW CHALLENGE

The implementation literature has become extensive enough that it is possible to create theories of governmental performance and to identify some of the chief obstacles to action. To date, however, the bulk of this research has been concerned with the most traditional instrument of federal intergovernmental policy, the grant-in-aid. Although there have been numerous studies of the old-style regulatory commissions, the newer types of intergovernmental regulatory programs, which are the primary focus of this report, have been studied much less frequently and less intensively.

Despite this shortcoming, various academic and governmental sources do provide enough information to suggest some major features of the process of regulatory implementation. This chapter reviews key findings. What it indicates, however, is in many ways troubling. There are a variety of administrative and political impediments to the effective operation of intergovernmental regulatory programs and to the attainment of their objectives. Indeed, implementing intergovernmental regulation may be even more difficult than the process of implementing intergovernmental grants-in-aid. As this chapter will illustrate,

- ☐ Substantial delays are frequently encountered between passage of a regulatory statute and the beginning of actual administration and enforcement.
- ☐ Legislative language and history often provide insufficient guidance on crucial operational questions.
- ☐ In many cases the technical or scientific information required for efficient and effective regulation is not available.
- ☐ Issues not addressed or left unresolved by

the Congress often erupt into intense political conflict during the rulemaking stage.

- Federal regulators tend toward expansive, inflexible, and costly interpretations of national requirements.
- Overly stringent or unrealistic regulatory standards and requirements actually may hamper progress toward national goals.
- The new forms of federal intergovernmental regulation have been litigated heavily, adding to delays and uncertainties.
- Federal courts typically have upheld agency interpretations of legislative intent, or have urged faster action, tighter standards, and more vigorous enforcement.
- Federal agencies generally lack adequate capacity and resources to assure full compliance with regulatory requirements.
- For administrative and political reasons, federal officials are often reluctant to impose harsh sanctions against state and local governments that fail to meet national standards or deadlines.
- Attainment of regulatory objectives depends heavily upon the leadership and commitment of target jurisdictions.

Criticism of Regulatory Performance

These conclusions are quite consistent with the widespread criticism of regulatory performance in general. Stephen Breyer notes that "as regulation has grown, so has concern about regulatory failure."[16] Many critics stress the enormous private sector cost burdens imposed by regulation, variously estimated at $60 billion to as much as $180 billion annually. They regard the regulatory process itself as unwieldly, unfair, and even fundamentally undemocratic in procedure.[17] More telling, however, is the belief that actual results have fallen short of expectations, despite substantial effort and outlays. Robert Crandall offers a harsh review of current health, safety, and environmental regulation, contending that

> there is no solid evidence that the regulatory programs are even modestly effective. In most instances, the statutes mandate tasks so extensive that the agencies cannot meet deadlines, enforce the rules they set, defend themselves in court, and conduct retrospect evaluations of their effectiveness.[18]

Another expert, Lester B. Lave, concludes that regulatory

> standard-setting is both time-consuming and cumbersome, that often the wrong substances are regulated, and the implementation and enforcement are expensive and inadequate.[19]

Finally, although public opinion polls do show considerable support for many regulatory initiatives, there is also considerable popular disenchantment with actual performance.[20] At least one expert believes that much of the public's dissatisfaction with government stems from excessive and ineffective regulation rather than excessive levels of spending:

> The real difficulty has been that, as society has become more complex, government has been forced to intervene more and more in the activities and decisions of consumers and businessmen in order to achieve national objectives—and has done so almost exclusively with detailed laws and regulations. Such regulatory efforts have often been inefficient and sometimes have done more harm than good.[21]

It would not be surprising if such views were expressed by members of those groups which have borne the brunt of meeting costly and demanding standards. However, many of those who ardently support the goals also recognize the shortcomings of the new federal regulation. Mike McCloskey, the executive director of the Sierra Club—one of the largest and most active conservation organizations—has provided this assessment of environmental regulations:

> What I think was clear as the '80s began is that the country has not yet translated either our beliefs or programs into tangible results. We have lots of laws on the books. We have a

> great many people working on programs with billions of dollars being spent, but the pattern of results is still very spotty. One can point to limited success in terms of improving air and water quality, in terms of fish coming back in many streams. But in terms of tangible measures of environmental improvement, particularly in the pollution-fighting field, we've probably moved only 15% to 30% of the way toward our goal. On some issues, such as hazardous waste dumps and toxic chemicals, we are still pretty much caught at the level of spinning out words with very little tangible action.[22]

At best, then, the record of achievement is limited and spotty. In few cases have statutory goals, or the earnest hopes of initial legislative proponents, been fully realized.

At the same time, the precise magnitude of failure or achievement is difficult to determine. The results of many programs are hard to measure. Furthermore, assessments depend in large part on the standard against which specific programs are judged. It is posible to find some evidence of progress in selected areas. For example, EPA data suggest that emissions of most major air pollutants have declined over the past decade.[23] The number of handicapped children provided an appropriate public education by local schools rose from 3.4 in 1977 to 3.8 million in 1979 after the passage of PL 94–142.[24] About 440,000 advertising signs were removed from alongside the nation's highways since the passage of the *Highway Beautification Act* in 1965.[25] On the other hand, in nearly every field, achievements have been inconsistent. Available data show no similar evidence of progress toward national water quality goals.[26] By Department of Education estimates, over 2 million additional handicapped children have yet to be identified and served by school districts.[27] Another 220,000 billboards remain to be removed, a job which the General Accounting Office estimates may require an additional 21 years.[28]

These mixed appraisals are nicely illustrated by a recent study of the effects of Title IX of the *Education Amendments of 1972*—a crosscutting requirement that prohibits sex discrimination in schools receiving federal financial aid—prepared by the National Advisory Council on Women's Educational Programs. According to the Council's generally positive report,

> The past nine years have seen much progress toward the goal of Title IX, far more than is generally recognized. But many problems still remain. The position of women and girls in education today resembles the glass which is half full and half empty, depending on one's outlook.[29]

As evidence of progress, the report notes that admission patterns have changed in colleges and professional schools, with women now constituting a majority of undergraduates. Financial aid, counseling, and other student services have become more equitable, and both educational programs and extracurricular activities have been opened to students of both sexes. Athletics have been the area with the most visible and dramatic changes. At the same time, employment of women in high-level education positions has improved only slightly, despite many complaints of discrimination. Women school administrators remain scarce, and women college instructors lag behind their male counterparts in number, salary and tenure.[30]

Such findings are quite typical. Hence, the view that "nothing works" seems as one-sided as the contrary claim that "all is well." However, the clearest lesson emerging from more than a decade's experience with implementing new intergovernmental regulatory programs confirms the conclusion of earlier studies: a lot can go wrong. Translating intentions into results is extremely difficult, time-consuming, and uncertain of success. The balance of this chapter draws upon the case study literature, evaluation reports, and program audits to identify and illustrate some of the most common problems and obstacles.

WRITING RULES: EASIER SAID THAN DONE

The rulemaking process—that is, the set of formal procedures through which a statute adopted by the Congress and signed by the President is translated into a set of specific requirements carried out and enforced by executive branch agencies—is much less widely understood than the more dramatic and more public legislative process.[31] Yet, it may be nearly as important. The laws adopted by Congress are not self-executing and often are written in broad terms. Administrative agencies, charged with interpreting and executing the will of Congress, must resolve any vagaries and ambiguities in developing specific procedures for program implementation Depending upon the area in question, rulemaking may require a high degree of technical expertise as well as sound legal judgment. And, because the affected interests often attempt to influence outcomes, it is deeply embedded in politics. The following discussion highlights these issues.

A Lesson in Complexity

The basic procedures governing the rulemaking process were laid down by the Congress in the *Administrative Procedure Act* (APA), adopted in 1946 in the wake of the burst of New Deal regulatory initiatives. Among other things, the APA was intended to assure an ample degree of openness and public participation in agency deliberations. It specifies, for example, that federal agencies must publish proposed regulations (in the *Federal Register*) and invite interested parties to comment upon them. In many instances, opportunities to submit written comments are supplemented by formal hearings. Recent Presidents also have embellished the APA's rulemaking procedure with further requirements specified by executive order. As *Chapter 6* indicates, these additions have often required agencies to consider a variety of alternative regulatory approaches, subjecting each to economic "cost-benefit" analysis. Only after completion of these steps may a final rule be adopted and published (in the *Code of Federal Regulations*).

The publication of a final rule does not necessarily conclude the rulemaking process. Agency interpretations of statutory language may be subject to judicial review and have, with increasing frequency, been challenged in court. Agencies also are free to propose modifications of our supplements to existing rules, and of course usually must do so when statutory language is amended by the Congress.

The tasks involved in rulemaking are often substantial and the time taken to complete them is generally measured in years, not months. Consider, for example, Section 504 of the *Rehabilitation Act*, adopted by Congress in 1973 to prohibit discrimination against the handicapped in federally assisted programs. Interpreting this 45-word statutory provision required determining who could be considered "handicapped" within the meaning of the law—one controversial question involved the coverage of alcoholics and drug addicts—and the detailed specification of what actions (or inactions) constitute unlawful forms of discrimination. HEW regulations implementing Section 504 were not issued until 1977, and consumed some 40 pages of the *Code of Federal Regulations*. Moreover, although the HEW rules provided some general guidance, similar determinations had to be made separately by each federal department and agency for those assistance programs falling within its jurisdiction. The rules prepared by the Department of Transportation, to cite one example, were some 34 pages in length.

Just how difficult and time consuming this process can be is suggested by a newspaper account of the effort to adopt Section 504 rules for the Treasury Department's general revenue sharing program. The responsible official, assigned in 1978 to interpret the 1973 law, devoted three years to the task. Over this period, the official had to:

- write the rules in accordance with the governmentwide guidelines issued by what was then the Department of Health, Education and Welfare,
- publish proposed rules in the *Federal Register*,
- send them to HEW for review,
- wait eight months for HEW approval,
- review President Carter's Executive Order 12044 to see if her office should do a cost-benefit analysis of her handicapped discrimination rules,
- consult OMB for an opinion on that question,

- □ submit the draft rules to the Equal Employment Opportunity Commission for review,
- □ consider the comments of those who responded to the *Federal Register* entry,
- □ revise the draft of the rules,
- □ publish the proposed rules in the *Federal Register* again,
- □ submit the rules to the EEOC again,
- □ wait a month for approval,
- □ comply with an OMB directive to write an analysis explaining why no regulatory analysis was necessary under Carter's executive order, and make this analysis part of the preamble to the rules,
- □ submit the rules to the Department of Health an Human Services (HEW's successor) for approval again,
- □ pray that HHS approved them before a pending executive order was issued that would transfer this approval power from HHS to the Justice Department,
- □ wait four months, and
- □ win approval a week before Justice took over authority to coordinate these rules.[32]

Nor did the saga end here. The author's efforts, scheduled to take effect on February 4, 1981, were delayed once again, this time by the freeze on "midnight regulations" that President Reagan imposed shortly after taking office. Although this freeze was to last 60 days (and did, for many of the affected rules), implementation of the Section 504 requirements was deferred again on March 30th, and again on June 1st, and again on June 16th—the latter time for an indefinite period. Following threatened court action by the Paralyzed Veterans of America, certain parts of the regulations were put into effect on an interim basis on August 14th.[33] The suspense was still not over, for early in 1982 the Department of Justice initiated a governmentwide review of Section 504 requirements.[34] Ultimately, however, no further alterations were made.

Regulatory Delay: A Common Problem

The 504 case, in which the rulemaking process extended over a period of some nine years, is by no means unusual. According to a study prepared by the U.S. Senate's Committee on Governmental Affairs,

> Most federal regulatory proceedings are characterized by seemingly interminable delays. It is widely thought that the regulatory process takes far too long to accomplish too little; that it is plagued by lethargy and inefficiency; and that it steers a rudderless course unassisted by plan or priority.
>
> Delay heightens frustration, impedes initiative, and postpones action on pressing problems. By sapping the agency's limited resources, it makes it impossible for the agency to accomplish what it otherwise could.
>
> Undue delay is very costly for government, consumers, and industry alike.
>
> It is at once a symptom and a cause of public frustration with federal regulation.[35]

Although the Senate committee study focused principally on the rulemaking procedures of such "old style" regulatory commissions as the CAB, FCC, and ICC, other evidence suggests that its conclusions apply with equal force to the regulatory agencies involved with intergovernmental programs. A comprehensive Office of Management and Budget study of the management of federal crosscutting requirements found that

> there is often considerable delay between the time a requirement becomes law and the time when official guidance on the requirement is issued to the agencies by the appointed lead body. In the case of many of the requirements, this delay is equal to if not greater than the time lag within the assistance agency in taking action on the requirement.... It took five years for the EPA to issue guidelines (April 16, 1975) implementing Section 508 of the *Federal Water Pollution Control Act of 1970.* Revision of the Advisory Council on Historic Preservatons'

> 1974 guidelines began in 1977 and was not completed until January 1979.[36]

Similar observations have been made about a considerable variety of other intergovernmental regulatory programs and program types, including rules on health planning,[37] endangered species,[38] handicapped education,[39] sex discrimination,[40] hazardous waste disposal,[41] occupational health and safety,[42] and strip mining control.[43]

Agency Mismanagement

A variety of factors—internal as well as external, substantive as well as procedural—seem to slow down the workings of the regulatory machinery. Bureaucrats, legislators, judges, organized political interests, and the public all share responsibility for regulatory delays and uncertainties. The best that can be said, on the basis of available evidence, is that there is enough blame to go around. The following discussion simply notes some of the factors that have been identified in various studies.

Given the central role played by the executive branch in rulemaking procedures, it is not surprising that federal bureaucrats are a principle target of criticism. The Senate committee study of regulatory delay stressed a series of factors pertaining to poor agency practices, including too much emphasis on "trial-type" procedures, inadequate planning and leadership by top management, too little effort in setting and enforcing deadlines, extra and unnecessary layers of review, and a failure to make sufficient use of incentives and sanctions to encourage particpants to speed up proceedings.[44]

In some instances, various administrative shortcomings do appear to have contributed to delays in issuing intergovernmental regulations. Fishel and Pottker, who conducted a detailed study of Title IX sex discrimination requirements, argue that

> The two years it took to develop the proposed regulation was inexcusably long. An internal DHEW management system that provided inadequate oversight over OCR, combined with poor administration and the lack of strong leadership in OCR itself contributed to the slow speed at which the regulation was developed. Considering the chaotic state of OCR during most of this time period, it is not suprising that it took such a long time to issue the proposed regulation; it is a wonder that a regulation got developed at all.[45]

Other evaluators concur that the Office of Civil Rights was "extremely ill-managed throughout the 1970s."[46] But OCR is not the only agency whose performance has sometimes been found wanting. The Environmental Protection Agency, according to a General Accounting Office assessment, was unorganized and understaffed during the crucial early stages of implementing the *Toxic Substances Control Act*. EPA took more than two years to develop an appropriate organizational structure for the program; engaged in a time-consuming search for an assistant administrator to head it; had difficulties filling other key management and staff positions; and did not develop a clear strategic plan to guide its actions.[47] As a result, GAO charged, neither the public nor the environment were much better protected four years after the passage of what President Ford had termed "one of the most important pieces of environmental legislation that has been enacted by the Congress."[48]

This kind of administrative criticism is consistent with a long line of argument that the problem with regulation is the regulators themselves—and that the solution lies in upgrading the quality of appointees.[49] At the same time, many other observers believe that mismanagement is *not* the sole or even principal cause of regulatory delays and inefficiencies.[50] They argue that federal regulators are as capable, energetic, and honest as the people employed in other lines of endeavor. Rather, a variety of structural and political factors affect how well regulators perform. These include the nature of the task imposed upon them, the incentives to which they respond, and the kinds of external pressures to which they are subjected. From this perspective, then, many of the problems of regulation seem to be generic in nature. They are inherent in the process itself.

Administrative Complexity

James Q. Wilson is one analyst who believes that bureaucrats are too often made the scapegoats for regulatory delays and shortcomings. A principal conclusion of his study, *The Politics of Regulation*, is that

> Much of what appears to be the result of bureaucratic ineptitude, agency imperialism, or political meddling is the result of the sheer magnitude of many regulatory tasks. Improving the quality of our air and water, making the workplace safer, guaranteeing that only efficacious drugs are used, regulating the price of natural gas, assuring that educational programs have no discriminatory effects—all these and many other laudatory goals impose simply staggering workloads on the responsible agencies.[51]

In some cases, the rapidly expanding duties and shifting national priorities of recent years would have taxed any organization. Both the Office of Civil Rights and the Environmental Protection Agency, whose administrative shortcomings were noted above, have been burdened with an ever-expanding array of new regulatory statutes to be interpreted, implemented, and enforced:

> Congress has continued to heap additional tasks on the EPA with each new law, often giving it new jobs before it could get a handle on old ones.... More than ever these days, the EPA is struggling to do its job. While the agency's list of unfinished business grows, it is torn apart by politics, economic constraints, and legal challenges. Many wonder whether the agency can meet its responsibilities for enforcing the nation's major environmental laws.[52]

Similarly, during the early 1970s, OCR had major new programs assigned to it at the rate of almost one per year. Given the mounting workload and slower pace of personnel growth, the agency's performance may be better than should have been expected.[53]

In other agencies, too, a lack of adequate staff resources contributed to delays and shortcomings. The Fish and Wildlife Service (FWS) of the Department of Interior has been much criticized for its slow progress in implementing the *Endangered Species Act* and especially in designating species requiring protection under its provisions. In self-defense, the program's manager stressed that he had only 6–8 professionals for assignment to this crucial task.[54] Optimum performance might have required a staff three to four times larger.[55]

Still, the size of the regulatory workload is not the sole source of delay and confusion. Some tasks are difficult and time-consuming by their very nature. Much of the new social regulation, and particularly those programs that call for setting standards, require specialized knowledge at or beyond the limits of contemporary scientific research. According to Stephen Breyer, gathering the information needed to write a sensible standard—and one which can withstand close technical, legal, and political scrutiny—is the central problem of the standard-setting process and the most pressing task facing many regulatory agencies.[56]

One example of the kinds of technical factors that can slow the development of federal regulations is provided by experience with occupational safety and health (OSHA) legislation. By and large, the officials of the Occupational Safety and Health Administration, established by law in 1970, were strongly committed to the agency's goals and the success of their new program. Indeed, if anything, OSHA may have suffered more from excessive zeal than disinterest during its early years.[57] This commitment was reflected in the agency's promulgation of some 300 pages of "consensus" safety and health standards in the first months of the agency's operation, well in advance of the two-year statutory deadline.[58] Since then, the rate of issuance for new standards has been glacial. By the end of the 1970s, the agency had issued fewer than ten final health standards and an equally small number of safety standards. At this rate, it appeared that OSHA might take over a century to develop standards for substances *already known* to be toxic.[59]

To a considerable degree, this slow pace of action results from the technical complexity of the tasks involved. Much contemporary health, safety, and environmental legislation requires administrators to set standards on the basis of scientific judgments about risk. The OSHA Act, for example, specifies that

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.[60]

Statutes regulating such diverse areas as air quality, drinking water, automobile safety, and food and drugs impose similar responsibilities. Although the task appears straightforward—and the goal certainly laudatory— problems arise because a review of scientific evidence usually does not provide clear, definitive answers to the questions of risks, benefits, or costs that regulators must address.[61] Instead, the information available is usually partial and sometimes contradictory. OSHA's regulatory delays are largely produced by the combination of an administrative procedure for standard-setting which has been described as "Byzantine" and "tortuous"[62] and the lack of relevant technical and scientific information. Steven Kelman observes that

> The quality of knowledge available on risks and costs in the area of occupational safety and health is surprisingly—indeed, shockingly—poor. Estimates of the costs of achieving various levels of protection have varied widely in every OSHA rulemaking proceeding. . . . The same problem exists for the scientific evidence.[63]

Similarly, Frank J. Thompson has commented that OSHA's task of

> isolating the most serious threats was . . . far from simple. Good data on occupational diseases were in short supply. Sometimes a job-related disease simply proved difficult to identify. Byssinosis or brown lung, for instance, resembled other diseases and posed complex problems of diagnosis. Then, too, linking a given disease to a workplace hazard (as opposed to a personal habit such as smoking) presented difficulties. The long gestation period for some cancers further compounded the complexity of the issues. The incidence of various types of occupational disease was, then, difficult to guage. One Congressman went so far as to conclude that the data available on the matter were "not worth a damn."[64]

In the search for information, regulators often turn to a variety of sources of expertise and information. Yet none of the available alternatives—in-house staff, industry, independent experts, or consumer groups—can be counted on to possess, or to be willing to provide, adequate or accurate analyses.[65] Although it is not required to do so by law, OSHA frequently appoints advisory committees composed of representatives of labor, management, and the general public. However, committee deliberations often have been wracked by major disputes and have done little to speed the development and acceptance of proposed standards. As Nichols and Zeckhauser observe,

> Even under the best of circumstances, the process is very time-consuming, particularly with major health standards, and there are often many delays, including court challenges by the affected industries. For example, in 1971 an industry association asked OSHA to develop a coke-oven-emissions standard. [The National Institute for Occupational Safety and Health] transmitted its recommendations in early 1973, the advisory committee completed its report in the spring of 1974, and the proposed standard was published in the summer of 1975. The final standard was not promulgated until Octo-

> ber 1976, five years after the standard was initially requested and almost four years after NIOSH presented its recommendations.[66]

Other examples of similar problems abound. EPA's efforts at devising regulations to protect the public from hazardous wastes also have foundered because of problems of analysis and definition.[67] Ideally, the regulations should protect human health and the natural environment while imposing minimum economic hardship on industry. However, the long-term consequences of exposure to many chemicals are not yet well understood. Environmental contamination has only recently been recognized as a problem—but some compounds may take 15 to 20 years to produce adverse effects on health. Thus, regulators have been faced with the duty of imposing emission controls in the absence of adequate scientific data. That they have had difficulty in doing so is suggested by the fact that it took the EPA some four years to published any rulings, primariy because of its problems in defining the legal and technical terms on which the rulings are based.

Much the same can be said of attempts to set regulatory standards in such diverse aras as air pollution control and the protection of endangered species. Many studies have found some positive association between pollution levels and the incidence of various illnesses, and do suggest that the levels of pollution found in many cities are harmful. At the same time, according to Charles T. Stewart, Jr., "Our knowledge of air pollution and its effects is inadequate for the policies that are being formulated and implemented."[68] Measures of air pollution levels lack precision, and too little is known about the extent to which various levels of different pollutants—along with dozens of other intervening factors—produce specific diseases in different individuals and population groups. Similar technical uncertainties have hampered the protection of rare animals and plants.[69] There are problems in classifying animals into speciies and subspecies, and even more difficulties in determining population size and status. With limited data, future population trends must be based upon often conflicting "expert judgments," rather than precise models. As a result, new listings have often appeared quite sporadic, and their validity has often been challenged.[70]

Statutory Ambiguity

Legislative imprecision is a third important factor that can slow, or complicate the rulemaking process. Although some kinds of regulatory tasks are, by their nature, quite demanding, this "complexity is compounded when the mandate to be carried out is unclear or controversial or when possible methods for doing so are uncertain," as Laurence E. Lynn, Jr., has observed.[71] Indeed, many analysts share the conviction of Richard J. Tobin that

> perhaps the most important aspect of any implementation process is the meaning asssigned to policy goals. Without a precise understanding of what constitutes fair housing, equal opportunity, or environmental quality, legislative mandates and presidential proclamations calling for acceptable levels of these values are meaningless.[72]

The lack of such clarity was one of the principal reasons for the five-year delay and intense controversy involved in devising regulations for Section 504, which bars discimination against the handicapped. In contrast with other nondiscrimination legislation, the one-sentence provision adopted in 1973 failed to indicate whether regulations would be needed to implement the law and, if so, which agency was to be responsible for preparing and enforcing them.[73] Moreover, the provision lacked *any* legislative history to assist in its intepretation. As a Congressional staffer observed subsequently,

> Section 504 did *not* one day of Congressional hearings, *not* one word was mentioned in the Senate committee report, *not* one word was spoken about it on the floor when the original bill passed, and there was *no* explanation in the Statement of Managers following the House-Senate conference.[74]

Lacking any clear guidance, the bureaucracy took its time in responding.[75] The following year, Congress did provide (in a Senate report) an *ex post facto* legislative history indicating Section 504 was to be regarded as a civil rights law, vigorously enforced by regulation. But progress was slowed by HEW's lack of familiarity with what practices might constitute discrimination against the handicapped and what remedies were appropriate.

After two more years, in May 1976, the department proposed rules to guide the recipients of its grant funds, and a group of handicapped persons—dissatisfied with the pace of events—obtained a court order commanding then-Secretary David Mathews to sign them. But Mathews demurred, saying that he wanted to be sure that the regulations followed Congressional intent.[76] According to the account of his successor, Joseph A. Califano, Jr., Mathews considered Section 504 to have been "one of the most irresponsible and thoughtless" acts of Congress and was dismayed by the proposed rules that called for elaborate structural changes in schools, hospitals, nursing homes, and other facilities, at a cost in the billions of dollars. He refused to sign them and, on his next to the last day in office, sent the 185-page text to Congress. "You passed the law with 'not one day' of hearings or debate and no guidance for implementation," he said in effect. "Here is our interpretation. Is it correct?"[77]

The impasse was left to be resolved by the incoming Carter Administration. Secretary Califano began a comprehensive review of 504, intending to restructure the rules to aim for program accessibility rather than structural changes, thus reducing excessive costs. But he was pressured by handicapped groups who, wearing "Sign 504" buttons, staged protests in front of his home, in HEW regional offices, and at departmental headquarters. Final regulations were issued on April 28, 1977, just in time to avoid another round of demonstrations.[78]

The case of Section 504 is a dramatic illustration of the kinds of confusion and delays that may result from statutory imprecision. Unfortunately, this case is by no means unique. Indeed, the implementation of most major nondiscrimination statutes has suffered from limited consideration during the legislative stage. Even Title VI of the 1964 *Civil Rights Act*—the granddaddy of all nondiscrimination provisions—

> emerged from Congress without a definite legislative history to serve as an explicit directive for administration. It proceeded to the White House, where, despite the creation of a Presidential Council on Equal Opportunity, a vague aura continued to surround the requirements implicit in the title. . . . The politics of the coalition and the nature of the issue created a situation in which none of the powerful elements within the legislative coalition . . . had a clear picture of the path that would be required for federal officials to proceed from the status quo to the goal enunciated in Title VI.[79]

Congressional debate concerning Title IX's ban on sex discrimination, adopted in 1972,

> rarely descended from broad generalizations and pious invocations of the need to assure fair treatment to women. There was no serious effort to review enforcement experience with Title VI for clues as to the problems that might emerge from a similar ban on sex discrimination. Nor, on the other hand, was there any serious effort to consider whether sex discrimination might raise rather different problems or issues than race discrimination or the extent to which separate facilities for men and women should be treated in the same way as racial segregation under Title VI. Congress, in short, simply handed over to HEW an extremely broad mandate in a very sensitive area, with a legislative history affording virtually no more guidance to HEW officials than the ambiguous terms of the statute itself.[80]

Similarly, in enacting the *Age Discrimination Act of 1975*, the Congress

> performed few of the conventional policymaking functions for which it is thought to be admirably designed: It failed to specify the problem; it gathered little information; it failed to articulate and weigh competing

> values or reduce them to operational terms; it considered no alternatives; and it declined to make hard choices.[81]

On signing the act into law, President Ford protested that "the delineation of what constitutes unreasonable age discrimination is so imprecise that it gives little guidance in the development of regulations to prohibit such discrimination."[82] The issuance of rules by HEW was delayed four years because most of the difficult analysis followed, rather than preceeded, enactment. Even then, HEW guidelines left many crucial issues unresolved and seemed likely to spark many judicial challenges.[83]

Legislative ambiguity is by no means an exclusive trait of civil rights laws. The case history for the *National Environmental Policy Act*, to cite a prominent example from another field, is quite comparable. Indeed, this statute has been characterized as "almost constitutional" in its breadth and lack of specificity.[84] Furthermore, even statutes that otherwise provide clear (or even overly explicit) instructions to their administrators sometimes have left crucial concepts or conditions undefined. Thus, the *Clean Air Act* has been said to be "too detailed in some sections and too vague in others."[85] In the view of Lester Lave and Gilbert Omenn, Congress should clarify the purposes of the standards for community air quality and provide general guidance on what constitutes an adverse health affect, how margins of safety should be determined, how priorities are to be set, and how monitoring should link community air quality with emissions control requirements. At the same time, they believe Congress should not continue to set detailed standards and deadlines; these tasks should be delegated.[86]

Similar flaws have been identified in national health planning legislation. According to Frank J. Thompson, "The roughly 30 pages that comprise the heart of the planning law . . . vacillate between precision and ambiguity."[87] As is true for the *Clean Air Act*, Congress devoted more attention to questions of means than to the careful consideration of the ends to be served. He notes:

> Congress chose not to specify the precise objectives that planning agencies were to pursue under the law. Instead, it essentially tossed the issue into the laps of local Health Systems Agencies (HSAs), state governments, and the federal bureaucracy. . . . The goals mentioned in the law . . . merely comprised a kind of laundry list of things that government ought to promote in the health arena. . . . This awesome list of goals left gaping uncertainties concerning the mission of the program. Not only were these objectives bereft of precise definition and specific numerical targets and timetables, but no clear priorities were established among them. . . . Within certain general bounds, then, Congress left the mission of the program up for grabs.[88]

Even programs that otherwise provide clear and precise guidance may be vague in certain specific areas. For example, PL 94–142 and its legislative history are unclear about whether or not children receiving speech therapy for minor impairments should qualify for federal assistance. Some sections of the law suggest that the program was to be concentrated on the needs of the severely handicapped. But the Department of Education has held that such students are eligible and, in practice, nearly one-third of the children participating receive only speech therapy. The General Accounting Office has urged Congress to clarify its intentions.[89]

As the sheer number of instances suggests, statutory vagueness seems to be more than a random or happenstance occurrence. Rather, it reflects a basic conflict in the expectations and requirements of national politicians and bureaucrats.[90] Regulators, if they are to be able to perform effectively, need a certain degree of specificity and guidance. A clear legislative history helps them to resolve hard cases and provides protection against political and legal challenges which can complicate and delay their work. Legislators, on the other hand, may prefer the vague phrase to the clear one, or the lofty statement of goals to the careful balancing of priorities, because such language promotes compromise.

But, although compromise may be good politics, it often produces bad law. As Laurence E. Lynn, Jr. notes

> When the Senate and the House, or powerful factions within either chamber, disagree on goals or priorities, the solution is often to accept both, conflicts notwithstanding, and to let the executive agencies cope with the confusion. The top officials must somehow untangle the knots and devise a program that is workable.[91]

As an illustration, Lynn points to the confusion over air quality standards spawned by ambiguities in the *Clean Air Act*. Although the Senate had apparently intended to establish a policy of "nondegradation"—that is, to prohibit any development which would result in increased pollution levels—the House had not addressed the issue. Both positions were expressed in different sections of the statute.[92] The result was a time-consuming, litigious rule-making process in which EPA, OMB, and industrial and environmental interests struggled to discern the will of Congress.[93] Similarly, the *Highway Beautification Act of 1965*, intended to encourage the removal of billboards from along major roads, has been called "one of the worst-drafted pieces of legislation ever to emerge from Congress" by one legal analyst.[94] According to Roger A. Cunningham, its major provisions were poorly drafted partly because they were a product of an uneasy compromise between legislators who wanted little, if any, control over advertising and those who wanted very stringent controls. Other problems arose from inadequate consideration by the Congress and the use of unclear or ambiguous language.[95] As a result, many crucial provisions of the statute were difficult to interpret, delaying initial implementation.

Political Conflict

As a number of the foregoing accounts suggest, another important characteristic of the program implementation process is that it is often engulfed by political conflict. Rulemaking is by no means a straightforward technical task of translating statutory language into a series of more detailed requirements to be applied n specific circumstances. Rather, it is frequently the occasion for intense disputes among contending interests. Political pressures and judgments affect even the standard-setting process—which, in theory, is the province of experts and scientific analysis.[96]

Although the legislative process is often described as a technique for "conflict resolution," the adoption of a statute seldom resolves all major issues. Rather, it shifts the field of combat to the national executive branch. Health planning legislation was adopted in 1974 by large Congressional majorities despite the heated opposition of both medical interests and state and local officials, as *Chapter 3* notes. The battle continued unabated during the implementation phase, and federal officials received thousands of letters opposing their initial guidelines. Progress was slowed as HEW attempted to navigate its complicated political environment.[97] PL 94–142 is another case in point. Most of the same groups that had been involved in the passage of the statute fought over the development of regulations.[98]

In both of these cases, political disputes continued after the adoption of a controversial statute. However, it is not unusual for the political controversies that erupt during the implementation stage to be *more* intense than those occasioned by the adoption of legislation. OSHA, for example, was adopted in 1970 by lopsided votes: 384-5 in the House and 83-3 in the Senate. Over the next year, however, oposition had grown so intense that more than 100 bills had been introduced to amend or even repeal the law. Businessmen complained, among other things, that they were subjected to official "harassment" and "being treated like criminals."[99] As noted above, Section 504—which was adopted by Congress with so little controversy or serious scrutiny—proved to be a real "hot potato" for HEW administrators. The initial draft rules, published in 1976, produced more than 300 written comments from the interested parties, reflecting a wide variety of views and criticisms.[100] Final regulations, which both Secretaries Mathews and Califano thought imposed excessive costs, were put into effect only after a series of demonstrations by handicapped groups and a televised sit-in in the Secretary's own office.[101] Similarly, the *National Environmental Policy Act of 1969*, which has been described as "one of the most controversial environmental measures of all time," only became controversial after its adoption.[102] The provision attracted little attention from lobbying groups and most legislators at the time of passage.[103] Later it became apparent that the newly created "environmental impact statement" process was burdensome to administer and offered a potent new legal weapon for environmental activists. Endangered species legislation is a fourth case-in-point:

> While the passage of ESA was uncontroversial, the history of its implementation is one of conflict and drama—a play with performances by the President, the Supreme Court, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, and numerous Congressional representatives, bureaucrats, and interest groups. In 1977 and 1978, the national media repeatedly portrayed images of conflict between the ESA and various federal development projects.... By delaying or stopping a number of ... projects, the ESA also came into conflict with the federal pork barrel, generating much political pressure.[104]

Although it is contrary to the "conventional wisdom," the great intensity of the political process surrounding rulemaking is by no means incomprehensible. Often, it is only during the rulemaking stage that potential costs, problems, and trade-offs are clearly recognized. Then, those whose interests may be harmed—or who have to pay the bills— mobilize for action. Members of Congress may become skeptical about their own handiwork. In the case of Section 504, a statutory ban on discrimination against the handicapped had strong appeal as a way to eliminate injustice and express sympathy for the disabled. But, five years later, this one-sentence provision had led the Department of Transportation to propose 51 pages of detailed rules regulating pedestrian overpasses, sleeping cars, waiting areas, rest rooms, telephones, and other aspects of transportation facilities.[105] The cost of providing wheelchair access to bus and subway systems, the single most expensive requirement, was estimated at between $3 to $6.8 billion over a 30-year period.[106] Even Rep. Charles A. Vanik, the sponsor of the provision, commented that "We never had any concept that it would involve such tremendous costs." A colleague, Rep. Robert W. Edgar, observed that "When Congress passed this statute, it failed to consider that vague and innocent-sounding words in federal law give rise to an endless variety of controversies."[107]

A variety of other case histories may be cited to illustrate this same point. Thus,

> When Congress passed Title IX in 1972, it was voting for a general principle of equality; the specific implications of the law were understood by few members of Congress.... As a result, the real public debate on the issues involved in eliminating sex discrimination followed, rather than preceeded, the passage of the law.
>
> It was only years later, after DHEW had drafted the regulation to implement the law, that Congress finally came to understand what Title IX actually meant in terms of changes in educational policies and practices. When the implications became known, many members of the Congress realized that they disagreed with the impact of the law for which they had previously voted."[108]

Similarly,

> Before the 1970 and 1972 pollution control acts were passed, benefits appeared to be diffused among the public at large and costs seemed to be concentrated on specific industries and localities; however, once these acts were implemented benefits that seemed intangible and distant had to be balanced against costs that appeared tangible and immediate. The motorist's immediate desire to get to work and to use his automobile without restrictions had to be balanced against the long-term and intangible costs of an unhealthy environment. When benefits appeared less tangible and more distant than the costs, the public was not willing to make significant sacrifices for the sake of pollution control.[109]

In some instances, it appears that the rulemaking process became embroiled in controversy because legislators had been unwilling to make hard choices that might offend or dissatisfy some particular group of constituents. Vague wording or a poorly defined phrase may prevent those whose interests will be harmed from realizing what is at stake and thus transfer disputes from the legislative to the executive branch. This is, at least, the conclusion of one student of Congressional behavior. Morris P. Fiorina contends that Congressmen try to win support by establishing new federal programs directed toward specific problems. At the same time, he says

> the legislation is drafted in very general terms, so some agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidentally, the tramping of numerous toes. At the next stage, aggrieved and/or hopeful constituents petition their Congressman to intervene in the complex (or at least obscure) decision processes of the bureaucracy. The cycle closes when the Congressman lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter's decisions, and rides a grateful electorate to ever more impressive electoral showings. Congressmen take credit coming and going.[110]

The judicial branch also plays an important role in resolving post-enactment conflicts. Interested parties unable to win their way during the rulemaking stage often turn to the courts for another try. Changing interpretations of requirements under the *Administrative Procedure Act* have opened the way for increasing judicial scrutiny of agency actions and, unlike traditional grant-in-aid requirements, many of the new forms of intergovernmental regulation have been the targets of major court battles. Typically, one set of litigants has claimed that federal agencies were moving too slowly (or too weakly) in their intepretation or enforcement of a statute; another group, often including state and local government officials, has charged that regulations overreach permissible statutory or even Constitutional bounds. The prospect of court action adds to uncertainties and further slows the process of implementation:

> Judicial review is time consuming, possibly taking years. Courts are crowded, delay is inevitable, and any serious confrontation may lead to an injunction postponing the effective date of the standard until the legal issues are resolved.[111]

REGULATION: TOO BROAD, TOO NARROW

The foregoing section has highlighted one of the principal concerns about regulatory implementation. The process is too time consuming, too prone to delay and to deadlock. Statutes adopted by the Congress and signed into law by the President may take years until they are translated into a set of specific, enforceable rules. Progress toward national goals is slowed while a management system is developed, technical issues are explored, and ambiguities in statutory language are resolved. Often, the resulting political conflicts are as intense—or even more intense—than those encountered during the legislative phase.

A second, very widespread criticism of federal regulation is that it is too extensive in scope and too specific in detail. By and large, the major aims of regulation—assuring a healthy environment, eliminating segregation or discrimination, protecting workers from industrial dangers—enjoy widespread support. Yet, there is an equally widespread feeling that regulators, in the pursuit of these objectives, have intruded into areas in which narrow, specific requirements are unnecessary or even counterproductive. To Herbert Kaufman, popular concern about "red tape" is premised on the belief that there are "too many constraints" and, perhaps more importantly, "too many pointless constraints."[112] Similarly, economist Lester C. Thurow suggests that two of the most fundamental propositions about regulatory processes are that "there are many areas which should have fewer regulations" and that "there are many silly government regulations."[113] Identification of foolish rules—issued, for example, by the Occupational Safety and Health Administration—has, he suggests, almost reached the status of a national parlor game. Often-ridiculed OSHA requirements include rules on toilet-seat shapes, standards for the height at which fire extinguishers must be placed, and specifications regarding the size of knotholes in the rungs of wooden ladders. In 1977, at President Carter's urging, the Labor Department began what turned out to be an arduous process of revoking more than 1,000 of its most "nitpicking" regulations.[114]

Although administered in many cases by states, OSHA rules have their direct impact on the private, rather than the public, sector. Comparable examples from the sphere of intergovernmental regulations were provided when HEW adopted rules that barred schools from having different dress and appearance codes for boys and girls. Vocal critics derided the idea that requiring girls (but not boys) to wear brassieres, or boys (but not girls) to keep their beards trimmed, constituted a form of discrimination on the basis of sex meriting federal scrutiny under civil rights laws. (Opposed by top officials during the Ford, Carter and Reagan Administrations, these regulations were finally revoked in July, 1982).[115] Similar reactions attended HEW's threat to cut off federal funds to school districts which allowed such separate sex activities as a boys' choir and a father-daughter dance. The halting of construction on the TVA's Tellico Dam to preserve the habitat of a three-inch fish, the snail darter, is often presented as another case of regulatory excess.

Naturally, such rules are of special concern to those businesses and governments that are expected to comply with them. But there are also more fundamental issues at stake. Former HEW Secretary Joseph A. Califano, Jr. believes that the department's civil rights enforcement effort was "undermined by the pursuit of issues that many people regarded as frivolous, matters which tended to infuriate many communities and subject HEW to ridicule."[116] During his tenure, he attempted (successfully) to prevent the Office of Civil Rights from adopting Title IX rules regulating such specific sports as half-court basketball and (unsuccessfully) to eliminate those barring school appearance codes. These, he believed, "were a nuisance that cost us respect for more important sex discrimination issues."[117]

From a financial point of view, there is reason to believe that the benefits obtained from some detailed or stringent regulations cannot justify the costs they impose. To Eugene Bardach and Robert A. Kagan, regulatory "unreasonableness" is in large part a problem of economic inefficiency. Thus,

> a regulatory requirement is unreasonable if compliance would not yield the intended benefits, as when installing a government-mandated safety device would not really improve worker safety because of the operating conditions in a partcular factory. Further, a regulatory requirement is unreasonable if compliance would entail costs that clearly exceed the resulting social benefits. For example, mandatory installation of a "second-generation" water pollution treatment system might be unreasonable, even if it were to improve water quality incrementally over the level provided by existing equipment, if that improvement were to be achieved only at extraordinary expense. Finally, unreasonableness means cost-ineffectiveness; for example, regulations requiring the retrofitting of buses and subways to accommodate wheelchair-bound citizens would be unreasonable if a special door-to-door jitney or taxi service could be provided at a fraction of the cost.[118]

Finally, because rulemaking takes time and energy, the spinning out of excessively demanding standards can result in delays, thus slowing down implementation. For this reason, policy analyst John Mendeloff contends that environmental health and safety regulation "is characterized not only by too much control but also by too little, and that the former problem is one reason for the latter."[119] He argues that one of the reasons major backlogs have developed in such areas as toxic substances control is that OSHA and EPA have opted for the strictest possible standard that can be upheld in court. But the need to develop substantial evidence in support of such standards—which are almost certain to be challenged—has consumed time and staff resources.[120] Meanwhile, dozens of other potentially hazardous substances remain unregulated. Environmentalists complain about these lapses, while businesses (and economists) object to the overzealousness of standards costing millions of dollars to implement for each life saved.[121] A better approach, he believes, would be to increase the pace of standard-setting while decreasing its strictness.[122]

Similarly, Malcolm Getz and Benjamin Walter suggest that EPA's efforts to regulate hazardous waste streams under the *Resource Conservation and Recovery Act* are overly ambitious. Given limited funds and staff resources, they believe that the agency should concentrate its attention on those specific substances which present the greatest health hazards and which are controllable at modest costs. They argue that "EPA's efforts to put a thumb in every hole in the dike may actually make the public less safe than it would be with no regulation at all."[123] The number of wastes defined as hazardous, coupled with the shortage of appropriate disposal sites, seems likely to raise disposal costs—and dramatically increase the amount of illicit dumping, increasing, rather than reducing, environmental threats.

Actors and Factors: Bilingual Education

As with other problems of regulation, no single factor suffices to explain the growth of regulatory scope and detail. Rather, there are a number of potential influences, each of which may be of varying importance in specific cases.

Federal regulations concerning bilingual education may be taken as a case study of this process in action. Over a period of some 14 years, each branch of the national government contributed to the development of rules, formally proposed by the Department of Education in August 1980, that would have required local schools to teach millions of non-English speaking children such subjects as science, mathematics, and geography in their native language.[124] A failure to do so could result in the withholding of federal education funds. William G. Colman has stressed the interaction among the legislative, judicial and executive branches in creating this expansive federal mandate, noting that

> recent controversy over bilingual education saw a general expression of Congressional intent interpreted into more specific form by the court, with the still fairly general court language translated by the administering agency into a sweeping policy document going far beyond what either the legislative or judicial branches had envisioned.[125]

Federal policy concerning bilingual education rests upon two different (but interrelated) statutory enactments. The first, Title VI of the *Civil Rights Act of 1964*, did not mention bilingual education, but did prohibit discrimination according to national origin, as well as race and color, in any program receiving federal financial assistance. On this basis, the Department of Health, Education, and Welfare six years later issued a memorandum suggesting that school districts should take "affirmative steps" to aid students whose English language deficiencies hamper their educational progress. The second foundation, known as the *Bilingual Education Act of 1968*, provided grant funds for "new and innovative programs" intended to meet the "special educational needs" of children with limited English-speaking abilities. Both programs encouraged some form of action to assist these groups of students. However, neither specified what these actions should be, and neither said anything about teaching basic subjects in any language other than English.[126]

A crucial change in the legal environment occurred with the Supreme Court's 1974 decision in *Lau v. Nichols*. The case involved a suit, brought by members of San Francisco's Chinese-speaking community with the aid of Legal Service attorneys, alleging that their children had a Constitutional right to special instructional assistance. This contention was denied by both federal district and appeals courts. However, the Supreme Court held unanimously for the plaintiffs, basing its decision not on the Constitution but rather on the

1970 HEW memorandum interpreting Title VI.[127]

Although the *Lau* decision did not indicate what specific remedies might be most appropriate—and what the parents had sought was additional instruction in English—Congress later in 1974 amended the *Bilingual Education Act* to place federal financial support behind bilingual education as the preferred approach. These amendments also stressed that such instruction was intended to help non-English speaking students identify with and maintain their cultural heritage, and provided a foundation for a great expansion in the number of language groups to be seved by the program.[128] The following year, HEW produced a report establishing bilingual instruction as the favored strategy for remedying *Lau*-type violations, and on that basis, negotiated compliance agreements with some 500 school districts charged with, or suspected of, discrimination on the basis of national origin.[129] Thus, both federal aid and federal mandates had shifted toward the same prescription. To attorney Stewart Baker, a former deputy general counsel in the Department of Education, these "*Lau* remedy" guidelines were

> a breathtaking example of federal intrusion into local affairs.
>
> They demand that school districts hire bilingual experts to follow students around, jotting down the language they speak at lunch, in the classroom, in hallways and at home.
>
> They also insist that bilingual and bicultural instruction be provided whenever 20 eligible students with a common language can be found anywhere in a school district; that means a city like Chicago has to provide instruction not merely in Spanish, the nation's most widely used language after English, but in 17 tongues ranging from Assyrian and Gujarti to Indic and Serbo-Croatian.[130]

Although Congress later showed increasing disenchantment with bilingual instruction—sparked in large part by doubts about its efficacy—the concept and principle had become well-established. In August 1980, the Department of Education proposed new Title VI rules which formalized and expanded its *Lau* guidelines.

The proposed regulations brought howls of protest from many in the education community, as well as some ethnic groups. Organizations of state and local officials challenged federal efforts to impose national requirements regarding how schools shall teach without an adequate legal or educational justification for doing so. The Supreme Court, they argued, had intended that the choice of remedies be left to local school systems.[131] They believed that the rules intruded on states' rights and were Constitutionally suspect on civil rights grounds as well.[132] Many education experts contended that the superiority of bilingual education over other possible methods of instruction, including special classes in English as a second language, had not been demonstrated. This was later confirmed by a comprehensive review of evaluation studies, which concluded that

> the case for the effectiveness of transitional bilingual education is so weak that exclusive reliance on this instructional method is clearly not justified. Too little is known about the problems of educating language minorities to prescribe a specific remedy at the federal level. Therefore, while meeting civil rights guarantees, each school district should decide what type of special program is most appropriate for its own unique setting.[133]

In the face of these widespread objections, and consistent with its own philosophy of regulatory relief, the Reagan Administration withdrew the proposed regulations in February 1981. Although some heralded the action, other observers doubted that it would make much real difference. Left untouched was a substantial network of other policy memos, guidelines, and court decisions.[134] Federal funding under the *Bilingual Education Act* continued to exclude alternative methods of satisfying Title VI requirements.[135] Thus, to some, "it seems unlikely that Terrel Bell's rescinding of regulations that were never implemented will have any real effect on the continuing controversy."[136]

This short case study, like many others in public policy, is an object lesson in unintended consequences. The Congress never debated nor voted for a bilingual education mandate. The Supreme Court never specified that such programs were necessary on either Constitutional or statutory grounds. Yet, both bodies took actions that were interpreted by administrators as supporting the policy, and neither took effective action to preclude it. Consequently, over a period of more than a decade, very general statutory language was translated into a series of very specific, intrusive and costly prescriptions on a controversial educational question.

Regulatory Dynamics

As the history of bilingual education requirements indicates, a variety of factors can push the process of regulation toward an ever-broader and more rigid network of standards, rules and requirements. And, as is discussed below, each of the crucial actors—the Congress, administrators and judiciary—sometimes has good reason to favor such stringent outcomes. It also appears, however, that some of the most crucial factors are inherent in the process of regulation itself. Experience suggests that there is a kind of natural dynamic at work, resting upon the fact that regulations must be applied in a wide variety of different settings and circumstances—but to be clear, enforceable, and seemingly impartial, must be written in regular, uniform language.

These conflicting operational realities can influence decisions at every stage of the regulatory process. First, as Bardach and Kagan point out, many regulations were initially adopted in response to some perceived crisis or catastrophe. Under these circumstances, there is a tendency toward tough, uncompromising action. They offer the historical example of a 19th-century Massachusetts legislature that, after hearing about an accident in which a train fell into a gully, immediately passed a law requiring that all trains make a full stop before entering onto any drawbridge.[137] The same "crisis" atmosphere has affected the development of some contemporary health, safety and environmental legislation. For example, traffic safety legislation was adopted after a sharp upturn in auto accident deaths—and the publicity that followed Ralph Nader's book, *Unsafe At Any Speed*—while the *Coal Mine Health and Safety Act of 1969* came after a disastrous accident in Farmington, WV, in which 78 miners lost their lives.[138]

A second factor, Bardach and Kagan believe, is that many regulatory systems are created in reaction to the misdeeds or shortcomings of a few "bad apples."[139] Both legislators and bureaucrats attempt to devise techniques for preventing "that kind of thing"—whatever it may be—from ever happening again. Thus rules are written to prevent the worst possible abuses, even though the number of actual or potential miscreants may be quite small. Because there are many ways to go wrong, a host of detailed rules seems to be called for; however, since rules by their nature apply to the "good" firms or jurisdictions as well as the "bad", many requirements will be unnecessary or unreasonable in some particular cases.

Once a regulatory system is established, there are other forces that tend to generate additional rules. Regulation begets more regulation because the inevitable shortcomings of one set of requirements suggest additional areas demanding control. In the view of economist Charles L. Schultze,

> Relying on regulations ... to deal with highly complex areas of behavior, as we do for control of air and water pollution and industrial health and safety, has a built-in dynamic that inevitably broadens the scope of the regulations. ... [I]f specific regulations are the only bar to prevent social damages the regulating agency must provide a regulation for every possible occasion and circumstance. First it will take 21 pages to deal with ladders and then even more as time goes on. Social intervention becomes a race between the ingenuity of the regulatee and the loophole closing of the regulator, with a continuing expansion in the volume of regulations as the outcome.[140]

Similarly, requirements may be extended from one specific field to others which are interrelated or similar in character. Jerry L. Mashaw comments that

> As the United States moves into the regulation of water quality and air quality, we begin to see more and more how these aspects of environmental quality are involved with solid waste disposal and land use planning generally—and we seek to regulate the latter also. As we encounter and regulate toxicity in foods, drugs and workplaces, we perceive residual categories of danger that can be approached only by regulating toxic substances as a whole. The opportunities for generalizing regulation abound. And the combination of evasive action by regulatees and the desire to motivate staff provide additional reasons for taking new regulatory initiatives. Indeed, given a relatively well-developed administrative state, the primary impetus for new regulatory legislation may come from the results of old programs and the initiatives of old agencies.[141]

Bardach and Kagan concur with both these views. They note, for example, that air pollution control agencies have been forced to adopt ever-tightening requirements in an effort to plug loopholes and meet demanding standards.[142] And, they observe that regulations in one field are readily applied, by analogy, to others. Civil rights regulations are a case-in-point:

> Once the principles of nondiscriminatory treatment and affirmative action were established for blacks, it seemed logical to extend similar rights to members of other groups that had been discriminated against (even if not so pervasively) and to draw upon the whole armamentarium of enforcement techniques developed to fight racial discrimination. . . . Thus through court order or legislation, affirmative action or antidiscrimination rules have been extended progressively to Mexican-Americans, Puerto Ricans, American Indians, Spanish-surnamed persons, Asian-Americans, women, physically and mentally handicapped persons, aliens, illegitimate children and workers over the age of 40.[143]

In the same way, transportation controls have been extended from railroads to trucking and airlines; environmental rules have successively targted water, air, solid waste, noise and pesticide pollution; and consumer protection legislation has broadened from food and drugs to automobiles, toys, credit and a variety of other products and services.

Statutory Requirements

The foregoing observations apply to regulation generally, but in some specific instances federal rules are extensive because Congress intended them to be so. Although many of the early statutes of economic regulation were cast in broad, flexible terms—leaving much to the discretion and expertise of agency administrators—some of the new social regulation had acquired a considerable degree of rigidity and specificity before it left Capitol Hill.

In part, at least, Congress shifted toward more stringent statutory requirements because it was dissatisfied with past regulatory performance. The traditional regulatory commissions have long been criticized by scholarly analysts for a hesitancy to take actions that were opposed by, or might weaken, the industry they were supposed to be regulating.[144] Their formal, legal independence was overshadowed, these academic critics believe, by excessive political dependence on interest group support.

During the 1960s, this "capture" theory was popularized in a number of studies by Ralph Nader and his "raiders." By 1970, it had become conventional wisdom, and sparked a new style of law making. The new regulatory activists eschewed such traditional statutory terms as "reasonable" or "feasible" that might be used to compromise the achievement of national objectives. Instead, legislative goals were often stated in absolute, unqualified language. Consideration of economic considerations was minimized or barred, and the severity and speed of sanctions were increased to enhance deterence.[145]

Stringent regulatory statutes served Congress's needs in a second respect as well. The public supported strong actions directed toward social and environmental improvements, but neither economic circumstances nor the Nixon White House favored greatly increased expenditures. Far-reaching new regulatory controls seemed to promise dramatic results at a comparatively low cost to the federal treasury. In short, tough regulatory standards became a useful political symbol.[146] As Alan Stone observes,

> Legislators are in the fortunate position of being able to demand the production of the best possible product ... and then shift the blame on administrators or regulated firms if these goals are not met.... Since it is virtually costless or at least much cheaper for legislators to deal in grand gesture and symbolic ambiguity rather than the difficult and costly process of accumulating data, weighing costs and benefits, and assessing alternative means, they have a clear incentive to choose the symbolic path.[147]

The major environmental statutes adopted in 1970–72 illustrate these points well. Dissatisfied with the rate of progress under previous legislation, and spurred on by the aroused public consciousness that followed "Earth Day," legislators vied with President Nixon and each other for leadership of the emerging environmental movmeent.[148] Congress adopted new air and water pollution controls that, among other very stringent features, set specific goals and timetables for eliminating pollution.

Many features of the *Clean Air Act Amendments of 1970* challenged the classical Progressive and New Deal-era model of an independent regulatory agency, isolated from political currents, insulated from judicial oversight, and entrusted to employ expert knowledge in developing specific rules and standards. Rather, Congress opted for what Ackerman and Hassler have termed an "agency-forcing" strategy. First, the law shifted responsibility for standard-setting from the states to Washington, where it was assigned to a single administrator located within the executive branch. Secondly,

> the act not only required the administrator to set quantitative clean air targets that "protect the public health," but it also insisted that the nation actually fulfill these clean air targets by 1977 at the latest. In taking these steps, Congress forced the agency to specify its goals far more clearly than required by the New Deal model.... [T]he agency had to define its goals in a highly visible way and recognize that Congress would call it to account by a specific date if it found the agency's performance unsatisfactory.[149]

The 1970 amendments also atempted to make air quality an overriding national value. In contrast with previous legislation, pollution was to be eliminated regardless of the costs imposed on the national economy or on specific regions and communities. As Alfred A. Marcus observes,

> In passing the 1970 *Clean Air Act* Congress explicitly stated that EPA should issue regulations without regard to their economic implications. Congress wanted deadlines met and progress achieved by certain dates without lengthy analyses and discussion of regulatory costs. According to the statute it passed, improving public health and not economic impact was the primary consideration.[150]

The 1972 *Federal Water Pollution Control Act Amendments* were, in many crucial respects, modeled on the *Clean Air Act*. Embracing more than 89 pages of fine print, the statute has been called "one of the most complicated pieces of legislation ever to emerge from the Congress."[151] Like its predecessor, it too attempted to mandate specific requirements and deadlines. As Harvey Lieber later observed, "Congress enacted and EPA implemented uniform *national* legislation rather than a flexible *federal* law."[152]

Given Congress's rather cavalier treatment of operational considerations, it is not surprising that its initial statutory deadlines were not met and have been extended repeatedly. Marcus comments that

> The innovators who influenced EPA's legislation overshot their mark, for the law appeared to go beyond what was feasible. . . . Trying to implement the plan for rapid progress uncovered an almost obvious inadequacy in the original theory about the need for clear statutes. Explicit goals and dates of achievement were not sufficient to ensure goal accomplishment. Goals and timetables that were explicit without also being achieveable and defensible were declarations of intention without real credibility.[153]

For example, later experience showed that meeting statutory clean air goals would require greater federal intervention than anyone had imagined in 1970 or than was, in fact, acceptable politically. Many metropolitan areas could have met 1975 healthy air standards only by placing severe restrictions on driving. In Los Angeles, gasoline rationing would have been necessary to achieve the 82% reduction in automobile use needed during the high-smog months. The plan for New York required higher bridge tolls and bans on cruising by taxicabs; that for Pittsburgh called for staggered work hours, increased parking fees, and exclusive bus lanes. Such proposals naturally incurred vigorous opposition from local businessmen, who feared that central cities would suffer further economic losses, and from citizens who had no intention of abandoning their cars.[154]

Other examples of this rigid, expansive legislative style may be found in the *Endangered Species Act*, which absolutely prohibited any project that might threaten a protected animal or plant species, regardless of other considerations, and in the *Occupational Safety and Health Act* which, the Supreme Court has ruled,[155] limits the application of cost-benefit analysis to the standard-setting process. Similarly, although civil rights legislation did not include specific goals and timetables for eliminating discrimination, the broad language enacted into law provided the basis for wide-ranging regulations and, in practice, has led to extremely detailed and specific requirements. From both a political and legal standpoint, it is one thing to declare that improving handicapped access to public buildings, increasing participation in women's sports, upgrading public services for the elderly, and offering non-English speaking children an opportunity to learn in their native language are *goals* of national policy; it is quite another to suggest that these same objectives are a fundamental *right* of the individuals concerned. As Jeremy Rabkin observes, language dealing with goals encourages the consideration of questions about program effectiveness, and admits the possibility of weighing costs, benefits and other competing objectives. In contrast, when policy issues are presented as questions of rights or entitlements, such concerns tend to recede into the background.[156] In general, he concludes that the Office of Civil Rights has favored expansive interpretations of statutory requirements because the Congress itself has spoken in sweeping generalities.[157] Just as with the environmental cases noted above, the nature of the legislative mandate—coupled with court decisions and an activist political constituency—encouraged the agency to develop extremely detailed and inflexible rules. In a number of respects, Rabkin suggests, "the expansion of OCR's regulatory authority (and the wide berth given to OCR's interpretive authority during the process) has represented a triumph of the civil rights ideology over routine politics."[158]

Bureaucratic Motivations

Although the foregoing discussion emphasizes the Congressional contribution, bureaucrats also have some reason to favor ever more stringent and extensive regulations. Indeed, it is almost conventional to place the principal blame for governmental "red tape" upon them. Bureaucrats, after all, do write and enforce federal rules. In contemporary mythology, a bureaucrat bent on aggrandizing his or her own agency's power is often found lurking behind every costly, foolish or intrusive requirement.[159]

In some instances, this appraisal may have a certain validity. Beryl A. Radin has argued that many of the first civil rights staff members in the Office of Education were strict moralists, even "zealots," who viewed their official responsibilities as

> a 20th century crusade. Evil—racism and segregation—was pervasive. A small, committed group of individuals would by their action bring truth to the heathens. The forces of good would rule; and conversion would be possible.[160]

In the same way, biologists within the Office of Endangered Species generally perceive themselves as environmental advocates:

> Many times OES biologists have been accused of letting these private values influence their biological judgment. For example, many of the staff will contend that the malacologist was overzealous in listing species because he was opposed to dam projects in part because they destroy molluscs. A similar controversy raged around the proposed listing and critical habitat designation for the Cahaba shiner and goldline darter that survive in Alabama's Cahaba River.[161]

Similarly, the Architectural and Transportation Compliance Board, which sets standards governing handicapped access to public facilities, for a time was dominated by strongly pro-regulation members. In 1978, Congress amended the *Rehabilitation Act* to require that at least five members of the Board be handicapped themselves. President Carter outdid this statutory obligation by naming nine handicapped persons, including several leading activists, to the 22-member body. The staff also included many with handicaps, among them noted advocates. Not surprisingly, this militant group produced far-reaching and extremely detailed rules applying to post offices, transit facilities, and other federally financed buildings.[162]

Still, although cases of this kind cannot be ignored, there often seem to be other motivations involved. In the view of James Q. Wilson, "government agencies are more risk aversive than imperialistic."[163] Regardless of their personal values and political credos, bureaucrats have a vested interest in avoiding charges of malfeasance and in protecting the reputations of their agencies. Rules and regulations proliferate, Wilson believes, chiefly because regulators are anxious to avoid scandals or crises that might threaten their status.[164] "Playing it safe" may require that regulators also "play it tough."

Wilson bases his conclusions upon studies of a considerable number of regulatory agencies, among them the Environmental Protection Agency, Occupational Safety and Health Administration, Food and Drug Administration and Office of Civil Rights. Other analysts, who have studied regulatory behavior independently, reach much the same conclusion. EPA has been viewed as striving to avoid sins of omission rather than commission in controlling hazardous wastes under the *Resource Conservation and Recovery Act*. If EPA labels "safe" some waste stream that does, in fact, pose hazards, it

> will face an angry Congress, a distraught public, and a torrent of journalistic *exposes*. Agency jobs may be lost, appropriations sliced, and functions shifted to other agencies. All are outcomes agency officials wish to avoid; they want to make current decisions minimizing future regret.[165]

In contrast, EPA has much weaker political and fiscal incentives to avoid the opposite kind of error, which involves labeling a harmless waste stream hazardous. Getz and Walter point out that the costs of regulatory excesses are borne by the economy, rather than the agency. Thus, even though real resources will be expended in battling innocuous residues,

> these costs will not explicitly appear as items in EPA budgets and Congressional appropriations. Rather, they will be passed on to consumers in higher prices, lower real wages, and to investors in lowered rates of return on their capital. Those adversely affected are not likely to be aware of the cause of their loss or its extent.[166]

The question of "capture". Whether motivated by excessive zeal or caution, both of these interpretations suggest that bureaucrats will err on the side of regulatory excess rather than regulatory insufficiency. It is worth nothing, however, that they run counter to economic theories about the dangers of regulatory "capture."[167] The standard view is that regulatory commissions tend toward *under*-regulation. This discrepancy suggests the need to identify factors that differentiate the newest types of regulation from their predecessors.

The first and most crucial distinction, which Murray Weidenbaum has stressed, is that much of the new social regulation "cuts across" a wide array of business and governmental organizations. In contrast, most of the earlier regulatory agencies were directed at a specific industry: railroads, airlines, utilities, broadcasting and so forth. These differences in responsibilities produce different patterns of political influence:[168]

> The new federal regulatory agencies are broader in the scope of their jurisdiction than the ICC-CAB-FCC-FPC model .... In the cases of the Environmental Protection Agency, the Consumer Product Safety Commission, the Federal Energy Administration and the Occupational Safety and Health Administration, the focus of the regulatory agency is not limited to a single industry. With each of these relative newcomers to the federal bureaucracy, its jurisdiction extends to the bulk of the private sector and at times to productive activities in the public sector itself. It is this far-ranging characteristic that makes it impractical for any single industry to dominate these regulatory activities in the manner of the traditional model. What specific industry is going to capture the EEOC or OSHA, or would have the incentive to do so?[169]

Indeed, as Weidenbaum adds, many of the new regulatory agencies are concerned solely with a single aspect of a company's or industry's performance—the racial composition of its staff, for example, or its accident rate or the solid waste it generates—rather than the general quality of its service and contribution to the economy. This narrow focus can produce an indifference to the effects of federal policies on any specific company, industry, community, or region. Indeed,

> if there is any special interest that may come to dominate such an agency, it is not the industry being regulated, but rather the group that is preoccupied with its specific task—environmental cleanup, elimination of job discrimination, establishment of safer working conditions, reduction of product hazards and so forth.[170]

The utility of Wiedenbaum's distinction is suggested by the fact that one of the few "new social" regulatory programs that has apparently been captured by regulated interests also is directed at a very specific, well organized industry. The *Highway Beautification Act* was adopted in 1965 as a means to control the proliferation of billboards along scenic roadways. Yet, in the view of Charles F. Floyd, the program has been a failure. Over the years, the interest of environmental groups has waned, while outdoor advertisers have transformed the act

> into a sign-industry-dominated program that is actually enriching and subsidizing the industry it was meant to regulate, and serving as a protective umbrella to shield that industry from state and local governments that desire to effectively control billboard blight.[171]

The character of these circumstances is suggested by the fact that the program's leading Congressional proponent, Senator Robert T. Stafford of Vermont, has proposed repeal of the act, while the Outdoor Advertising Association of America has lobbied hard to continue and expand it.

In addition to these structural differences, the old and new regulation also may rest on different social and political foundations. Paul H. Weaver notes that the old regulatory commissions were supported by "populist" and "Progressive" reformers, including some businessmen, who sought the economic and social benefits of a large-scale, technologically progressive, but efficient and individualistic order. In contrast, he believes that much of the new social regulation is less concerned with health, safety and environmental goals *per se* than in shifting power from the corporate sector to goverment. It won political support, he argues, from a "new class" of professionals and managers, including many employed by the public agencies, research institutes and the media. Different forms of regulatory behavior and politics, then, may reflect fundamental changes in the nation's economic and social structure.[172]

Judicial Scrutiny

As the foregoing discussion has indicated, there are a variety of factors that push regulatory activities in the direction of more extensive, and more specific, requirements. Some of these factors may be inherent in the internal logic of the regulatory process itself, but both legislators and bureaucrats often have reasons to favor stringent results.

In principle, however, American government reflects a system of "checks and balances." In the view of Madison and other of the Founders, any excesses on the part of one branch would be constrained by the other branches. The Supreme Court quickly established itself as the ultimate arbiter of the propriety of actions by the Congress and President, as well as the states, and in many periods it has served as the principal "checker."

Indeed, through much of its early history, the Supreme Court might be charged with having something of an "anti-regulatory" bias. As was indicated in *Chapter 2,* during the 19th century, the Court used its interpretation of the commerce clause of the Constitution to bar state actions in a variety of fields. Although it looked more favorably on federal regulatory controls in the Progressive era—which saw the first round of national "social regulation," as well as ardent trust-busting and efforts to strengthen the Interstate Commerce Commission—it had a change of heart shortly thereafter. The court barred Congressional efforts to regulate child labor in 1918, it weakened federal anti-trust provisions in 1921, and, in the early 1930s, it struck down a variety of national economic regulations affecting both industry and agriculture.

None of these descriptions apply to the role played by the Supreme Court in more recent decades, however, nor to its decisions in the realm of intergovernmental relations in particular. Although judicial review could, in principle limit both legislative and administrative policymaking, in practice "the record of judicial review of regulatory activity . . . is in many ways the record of failed attempts to interdict the progressive logic of regulation."[173] It is possible to point to a few areas in which the courts have applied a restraining hand—but these are comparatively few in number and even more limited in scope. Instead, the judicial branch has given the "green light" to many types of rules and regulations; sometimes it has prodded agencies and Congress into more forceful action, and it has added considerably to the sum total of regulation on its own. Thus, James Q. Wilson comments that

> Federal restrictions on state and local government have increased dramatically in the last decade or two, but only partly because "Washington bureaucrats" are "giving orders" to local officials. Though these things are hard to measure, it is likely that the principal source of the increased constraints on the freedom of action of localities has been the federal courts. As the range of federal activities has enlarged, as the number of programs funded by federal dollars has grown, as the courts have become more open to the complaints of citizen groups, *legal*, not political, action has become the chief means by which local officials are made to act in accordance with somebody's version of federal standards.[174]

The litigation explosion. As Wilson's careful language indicates, it is probably impossible to determine the exact number of judicial—as opposed to statutory—mandates, and past researchers have wisely avoided trying.[175] Indeed, there is no reliable way for distinguishing between the two for, although some judicial mandates are firmly rooted in Constitutional guarantees, most are simply a court's elaboration of statutory provisions. Whether or not the court's rendering of the intent of the

Founders or the Congress is the correct one is, of course, often disputed by the judges themselves, no less than others. At the same time, it is also true that Congress sometimes adopts legislation to promote judicially defined Constitutional objectives. Thus, whether or not the courts are actually the "principal source" of increased constraints remains an open question.

Still, certain facts seem indisputable. First, by all accounts, the number of issues of federal-state-local relations being presented for judicial review has mushroomed enormously in recent years.[176] During the 1950s and early 1960s, intergovernmental problems were chiefly of concern to public administrators, fiscal analysts, and politicians: "sorry, lawyers need not apply." Those days are gone, although the change has yet to receive due attention.

Thus, the authors of a 1980 OMB survey of grant law—who had expected to turn up fewer than 200 relevant legal cases—actually found more than 500 before their study was concluded.[177] This enumeration was by no means exhaustive. Yet, it is a firm indication of what Richard B. Cappalli discribes as the degeneration of "cooperative federalism" into "conflictive federalism"—a new pattern of intergovernmental relations in which legal challenges and judicial action are a regular occurrence. The trend, he says,

> is clearly away from the collaborative, conciliatory, and cooperative model of past years and toward one of arm's-length relationships, hard bargaining, and frequent confrontations. A decade ago suing a grantor agency was an extraordinary act; today it is just another part of the job. Not too long ago questioning in court the denial of a discretionary grant was unheard of; today dozens of actions are being brought. In the middle of the 1960s grantees quietly accepted federal dictates; today any unpleasant federal decision is likely to be challenged.[178]

Judicial intervention also has embraced some of the most legally sacrosanct and traditionally local of functions. For example, the courts traditionally have not played a significant role in determining educational policies, but, during the late 1960s and early 1970s, they were

> thrust into the vortex of debates over the procedural and substantive rights and liberties of students and teachers: decisions concerning, for example, students' and teachers' rights of free speech and peaceful protest and the procedural protections available to students and teachers whom school districts wish to discipline or dismiss have important implications for the management of school affairs. Of greater moment, courts have assessed claims based on the assertedly inequitable treatment of particular classes of students: those residing in "poor" school districts or attending minimally funded schools within a particular district, the handicapped, the non-English speaking, and women.[179]

A wide variety of factors have contributed to this litigation explosion. Among other considerations, Cappalli identifies both the growing tendency to regard a grant as an "entitlement," rather than a gift, and the increased availability of federal court jurisdiction to handle these disputes. However, a change in the character of federal requirements—as described in foregoing sections of this report—was also a contributing factor. For example, Cappalli stresses the addition of regulatory "strings" having little relationship to program goals; that is, the growth of crosscutting requirements.[180] Another legal expert, George D. Brown, concurs, commenting that

> the major change which is most clearly related to grant litigation is the proliferation of the crosscutting or national policy conditions .... Third party challenges based on asserted violations of the crosscutting conditions are probably the biggest single growth area within the overqall field of grant litigation.[181]

According to the OMB survey, however, only about half of the crosscutting requirements addressing socio-economic issues, and less than one-quarter of those that address administrative or fiscal management problems, have been involved in litigation.[182] Thus, the "litigation explosion" has been, to a considerable degree, concentrated in specific areas. Certain statutes are notorious for the number of cases they have generated. For example, there were nearly 800 cases filed against federal agencies under the *National Environmental Policy Act* in the statute's first seven years.[183] The more recent *Age Discrimination Act of 1975,* which prohibits all forms of age discrimination in federally assisted programs, leaves many questions unresolved, and has for this reason been described as a "vast paperwork exercise" that will "keep thousands of lawyers employed for many years." This legislation, Richard B. Cappalli believes, "exemplifies the worst characteristics of the federal process of establishing and implementing public policy" and offers "many illustrations of federal decision-making gone amuck."[184]

Programs utilizing the partial preemption device, typically found in the environmental protection area, also have been litigated heavily. For example, the National Commission on Water Quality noted in 1976 that there were more than 250 cases contesting various provisions of the EPA's effluent guidelines.[185] A 1981 study of judicial handling of the *Clean Air Act* cited over 150 important cases involving the implementation of the program.[186] And, with a single exception, business organizations have contested every OSHA health regulation in court.[187]

Although direct orders and crossover sanctions are fewer in number, neither has escaped judicial scrutiny, and some have been extensively challenged. Following passage of the *Equal Employment Opportunity Act of 1972,* for example, the number of cases charging employers with discriminatory actions rose from about 1,000 to 6,000 in 1977.[188] Similarly, there have been hundreds of suits involving the *Education for All Handicapped Children Act of 1975.* Indeed, by one estimate, more than 40% of all student litigation against school districts concerns questions of handicapped rights.

A second, equally indisputable, fact is that the courts themselves have, by Constitutional interpretation, imposed a number of significant (and sometimes extremely costly) responsibilities on state and local governments. In the area of law enforcement, for example, these range from the obligation of an arresting officer to read suspects their "Miranda rights" to the obligation of a state to assure "humane" living conditions for those convicted. As indicated in *Chapter 1,* the Congress itself has imposed very few "direct order" mandates on state and local governments. The judiciary, in contrast, has shown few inhibitions about this form of regulation. In such areas as penal, welfare, education, mental health, and environmental protection policy, judges have sought not simply to monitor bureaucratic activities but to restructure them by changing their processes and policies.[189] Thus,

> Federal district judges are increasingly acting as day-to-day managers and implementors, reaching into the details of civic life: how prisons are run, medication is administered to the mentally ill, custody is arranged for severely deranged persons, private and public employers recruit and promote.[190]

Thirdly, as *Chapter 2* notes, the courts generally have upheld Congressional exercises of national regulatory authority *vis a vis* the commerce and spending powers, even in the face of heated protests (on Tenth Amendment and other grounds) by states and localities. The extension of new forms of federal regulation into ever-expanding areas of state and local governmental responsibility, then, has not gone unchallenged. Yet, only in a single instance has a modern federal statute been found to exceed the proper authority of Congress *vis a vis* the states. And, even though the 1976 decision in *NLC v Usery* was hailed by some as a real turning point, later court decisions have severely reduced its apparent protections.

Finally, and most importantly for this chapter, the courts have seldom served as a check on possible bureaucratic excesses. Generous interpretations of Congressional regulatory authority under the Constitution have been coupled with equally generous judicial interpretations of the powers conferred on administrative agencies by federal statutes.

This latter point requires elaboration, however, because the courts have not devised a single, consistent posture. Instead, they have taken somewhat different positions, in different cases, at different times. Three general, somewhat overlapping, historical trends may be identified—along with a number of exceptions to each in the courts' stance on regulatory issues.

A history of scrutiny. With the growth of federal regulatory statutes in the late 19th century, the courts began to fashion what might be called the "traditional" model of administrative law.[191] Under this interpretation, administrative agencies are simply a "transmission belt" for translating statutes into more specific administrative directives. The courts' function was viewed as one of keeping agency action within the bounds specified by the Congress. On this basis, the Court insisted that the legislative branch provide a clear statement of ends and means; statutes that delegated an overly-broad or unclearly specified range of responsibilities to an administrative agency could be struck down.[192] Agencies were expected to employ decisionmaking procedures that assured compliance with statutory intent. Judicial review was provided to assure adherence to both of these aims and, under these standards, judges overturned many agency actions.[193] At the same time, the courts removed themselves from passing upon matters not addressed by law; these generally were left to agency discretion.

A posture of deference. This traditional approach was premised, however, upon a considerable degree of clarity about the aims of the legislature. Vague, general, or ambiguous statutes create so much discretion that they threaten the legitimacy of the "transmission belt" theory, as Richard B. Stewart comments. And, as he notes:

> rather than being the exception, federal legislation establishing agency charters has, over the past several decades, often been strikingly broad and non-specific, and has accordingly generated the very conditions which the traditional model was designed to eliminate.[194]

New Deal Congresses, in particular, delegated sweeping powers to a host of new agencies in very general terms. This pattern was continued in some of the newer "social" regulation.

As a consequence, the "nondelegation doctrine" was largely abandoned in the late 1930s. Bowing to the economic exigencies and political currents of the time, the Court began to accept broad delegations of legislative authority to the administrative branch. Thereafter, judicial deference to the results of agency rulemaking procedures became the modus operandi.[195] It often remains so today. For example,

> When Congress delegates broad rule-making authority to an executive agency, as is typical in federal grant statutes, regulations properly promulgated under such authority will be judicially upheld if "reasonably related" to the purposes of the legislation.[196]

Hence, to the extent that there are other factors in the regulatory process that encourage ever more stringent requirements, the courts, adhering to well established doctrine, do little to stand in the way. In fact, recent years provide numerous examples of specific instances in which the courts have upheld stringent agency regulations against challenges that they exceeded statutory authority. In the *Lau* case, described previously, the Supreme Court mandated the provision of special educational services to minority-language students on the basis of an HEW memorandum interpreting Title VI. This decision, in turn, provided the foundation for further, more far-reaching, and extremely controversial bilingual education regulations.[197]

More recently, in May of 1982, the High Court reversed a lengthy string of lower court decisions to hold (in *North Haven Board of Education v. Bell*) that the sex discrimination provisions of Title IX apply to university and school employees, as well as to students.[198] Despite uncertainties in the statute's language and legislative history,[199] the Court, by a 6-3 decision, affirmed the broad interpretation that has been advanced by the executive branch since 1975.[200] Similarly, in *Grove City*

College v. Bell (1982), the Third Circuit Court accepted the Education Department's application of sex discrimination rules to a small, Presbyterian college that had never accepted federal funds in any form, but did enroll students who had received federal scholarship grants or loans. To the college, the issue was one of principle. "We believe in women's rights," its President said,

> but we support those rights voluntarily, as a matter of Christian conscience ....To sign a compliance form is to accept H.E.W. jurisdiction over a college that doesn't accept a penny of government money.[201]

The Court took a contrary view. "We are satisfied," it declared,

> that monies which are paid to students, who in turn use those funds for their education, constitute no less a part of a college's revenues than federal monies paid directly to the institution itself.[202]

Because Title IX was adopted as a floor amendment, the courts have had little to go on beyond the remarks of its chief proponent and the explicit language of the statute itself, which is both short and sweeping. In some other civil rights cases, however, the judiciary has accepted agency interpretations that fly in the face of much conflicting evidence. Included are affirmative action practices that go well beyond the simple ban on overt job discrimination Congress believed it had enacted with Title VII of the 1964 *Civil Rights Act*. In *Griggs v. Duke Power* (1971), the Supreme Court barred employment tests and other job qualifications that had "disparate impact" on protected minority groups unless their relevance to successful performance had been clearly documented. This decision was contrary to Congress's apparent aim of prohibiting only intentional discrimination or unequal treatment on the basis of race. Indeed, Congress had gone out of its way to assure that ability tests which were not designed, intended, or used to discriminate would be insulated from challenge,[203] and to bar the imposition of "quotas." "What the bill does," one sponsor had explained, "is simply to make it an illegal practice to use race as a factor in denying employment."[204] Gary Bryner has commented that "while the Court's *Griggs* ruling is in agreement with [Equal Employment Opportunity Commission] and [Office of Federal Contracts Compliance Programs] guidelines, it conflicts with the wording and legislative history of Title VII."[205]

Many members of Congress have exhibited dismay with the apparent judicial preference for executive branch, rather than Congressional, interpretations of legislative intent. Since 1975, Senator Dale Bumpers has sponsored, in varying forms, an amendment to the *Administrative Procedure Act* that would require the courts to undertake an independent review of legal issues and weaken the presumption in favor of agency rules and regulations. In his view,

> a fundamental premise of our system of government is that the courts interpret and apply the law; they are the ultimate authority on all legal questions. It simply makes sense for courts to decide independently whether an agency has exceeded its authorized powers. ... It is folly to expect an agency to be objective about the limits on its authority ; yet, by deferring to the agency's judgment, many court decisions encourage federal bureaucrats to abuse their power .... The court, not the agency itself, should decide whether the agency has overstepped its authority ....[206]

The Bumpers Amendment has been adopted twice by the Senate, most recently as a section of the "Regulatory Reform Act" (S 1080, 97th Cong.)[207]

On the other hand, there are some analysts who hold Congress itself accountable for possible bureaucratic excesses or judicial misinterpretations. For example, Congress was well aware of the Title IX interpretations espoused by the executive branch and never acted to overturn them—a point Justice Blackmun emphasized in the *North Haven* decision.[208] In the case of equal employment opportunity rules, Gary Bryner charges:

> By default and design, Congress has delegated to the courts the re-

> sponsibility for formulating and implementing equal employment opportunity policy. By design, in a compromise aimed at southern Congressmen, Congress created an enforcement agency with no enforcement powers and lodged enforcement power with the courts, giving employers subject to government action a haven of process and delay in resisting governmental intervention. By default, Congress failed to consider and subsequently failed to respond to a number of fundamental elements of equal employment opportunity policy. Not only were statutory provisions unclear, and legislative history contradictory, but periodic confusion and controversy over agency and court decisions were almost always met by Congressional inaction.[209]

A practice of activism. When the courts have not simply aquiesced to agency interpretations of statutory requirements, much more often than not they have come down on the side of more rigorous rules and tougher enforcement. That is, they have generally added to—not substracted from—the sum total of agency rules and regulations.

The *National Environmental Policy Act of 1969* is a good case study of how an ambigious statute—administered initially with some reluctance by federal agencies—was transformed into a demanding and detailed set of procedural requirements by virtue of court action. As a thorough analysis of the statute's early and most decisive cases noted:

> The courts have been vigorous in reviewing agency compliance with NEPA. They have enforced strict standards of procedural compliance, and in instances where Congress failed to specify how the act should be implemented, they imposed judge-made requirements which give it wider scope. As a result, the courts are thought of as the principal enforcers of NEPA.
>
> ... While avoiding "unreasonable extremes," the courts have held the agencies to each detailed procedural step mandated by the act, have expanded the range of judicially enforceable NEPA duties, and have undertaken close scrutiny of agency compliance .... [O]ver the past three years the courts have broadly interpreted and applied a variety of key NEPA provisions. "All" agencies had to comply "to the fullest extent possible."[210]

The courts became the guardians of NEPA's environmental impact statement process largely by self-appointment. It is true that judges were very responsive to NEPA's legislative history—and particularly to the floor remarks of its sponsors, who had declared in strident tones that the time had come to establish a new foundation for environmental policymaking.[211] At the same time, neither the statute's language nor its legislative history called for judicial review. Indeed, some federal judges held that the act did not "create any rights or impose any duties of which a court can take cognizance," although others inferred that "it is harder to imagine a stronger mandate to the courts" than the one NEPA provided.[212]

A variety of factors affected this activist predisposition. But, in the view of Frederick R. Anderson, who conducted a detailed analysis of the early NEPA cases, the most important of these was a general shift in judicial orientation.[213] NEPA happened to come along when the courts were tightened up their reviews of administrative decisionmaking. The traditional attitude of "deference" was beginning to be set aside in favor of stricter scrutiny of the substantive basis for agency actions, as well as their procedural propriety. At that time, there was an increasingly widespread judicial belief that

> Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible .... Discretionary decisions should more often be supported with findings of fact and reasoned opinions.[214]

Court actions on NEPA, then, largely reflected a newly critical and activist judicial stance, rather than program-specific concerns. Therefore, it is not suprising that similar results have obtained in other areas. In earlier cases concerning the *Federal Insecticide, Fungicide, and Rodenticide Act,* the courts had required federal administrators to explain more clearly the criteria employed in deciding not to suspend the registration of DDT. This set a precedent that conditioned the response to NEPA.[215] Recent history also indicates that "the prime mover behind implementation of the *Clean Air Act* has not been Congress or EPA, but the courts."[216] In the single most important clean air case, *Sierra Club v. Ruckelshaus* (1972)[217], the Supreme Court upheld findings that the act requires EPA to prevent any deterioration of air quality in areas already cleaner than specified by national air standards. Although many environmentalists supported the decision on policy grounds, all parties conceded that neither the act itself nor its legislative history mandated such an effort.[218] However, in 1977, the Congress showed its after-the-fact concurrence, writing into law a program even more demanding than that devised by EPA in response to court decisions.[219]

Judicial pressure also has broadened the *Endangered Species Act.* In 1978, the Supreme Court ruled that the act afforded absolute protection to the sole remaining habitat of a small fish, the "snail darter," thus halting construction on the TVA's Tellico Dam. (This particular decision was later overruled by legislative action). However, stringent interpretations by the courts in this and other cases produced a number of important changes in agency regulations and actions.[220] Nor has judicial activism been confined solely to the environmental field. For example, HEW's Office of Civil Rights—which administers a series of antidiscrimination laws—has received far closer supervision from the courts than either the Congress or executive branch.[221]

Opinions differ as to the results of judicial intervention. Many have criticized the courts for an excessively heavy-handed approach to NEPA and point to instances in which judges enjoyed well meaning attempts to comply. On the other hand, Richard Liroff argues that

> by the end of the 1970s a sufficient body of NEPA jurisprudence had emerged applying a "rule of reason" that one could conclude that good efforts to implement the statute would satisfy the average federal judge while deliberate efforts to avoid it would be subjected to judicial sanction.[222]

Although systematic research is lacking, anecdotal evidence indicates that stories about the shortcomings and adverse effects of the environmental import statement (EIS) process are as common as those about its value or success.[223] Furthermore, several studies suggest that impact statements are too long—and of too little use—to agency policymakers.[224] "The law's biggest weakness," in the view of a spokesperson for the National Wildlife Federation, "is that it does not require the agencies to act on the information they develop."[225] Hence, EIS preparation may be more an exercise in paperwork than in analysis. Bardach and Pugliaresi contend that, although the procedure assures that federal agencies give *some* look at environmental issues, it does not assure—and may discourage—a *hard* look.[226] In the main, they believe, EIS statements are compliance documents, designed to ward off federal judges. They are often unread by decision-makers and often are not worth reading.[227]

As with NEPA, judicial intervention in the *Clean Air Act* seems to have been a mixed blessing. On the one hand,

> the courts closed serious loopholes in a flawed statute; they acted decisively and in an innovative fashion while others vacillated; they sought both to preserve the health-protecting goal of the act and to temper the harsh uniformity of administrative regulations.

Yet, in the opinion of the same expert,

> the courts often acted with a heavy hand, laying down absolute yes-or-no rules where more subtile differentiations were needed. They proved insensitive to the administrative and political constraints on the agency, at times mistaking the agency's recognition of its limitations as evidence of bureaucratic "footdragging."

> Their solutions to problems with the act have made a complicated regulatory scheme even harder to understand and to implement .... Viewing these decisions in the aggregate we can see that the courts subjected EPA to contradictory demands, exacerbating rather than ameliorating the difficulties inherent in the regulatory scheme established by the *Clean Air Act*.[228]

Much the same may be said in the field of civil rights, where it is doubtful "whether judicial interventions have, on balance, enhanced OCR's effectiveness or simply exacerbated its inherent enforcement difficulties."[229] Or, as Bardach and Kagan observe about OSHA,

> If law is the medium of legalistic enforcement, it can also be the medium of legalistic contestation, and as the adversaries exhaust their energies in legal battles the basic goals of the regulatory process remain unattended. They are either displaced by the idea of winning or are simply forgotten because resources needed to achieve them are dissipated in the legal struggle.[230]

If there is doubt about the *programmatic* implications of court intervention, however, there is no doubt concerning the *political* consequences. Increasing litigation has provided interest groups with an important new lever on agency decisions. For this tactic to be successful, it is not necessary to *win* a case, or even to actually *file* a case: the threat of court action is, in and of itself, a potent political weapon in the hands of skilled attorneys.[231]

In some instances, as David L. Kirp suggests, the courts have offered groups with otherwise poorly represented interests an avenue for "end runs" around other governmental institutions.[232] And the use of legal action has been abetted by a growing judicial inclination to view administrative tasks as essentially "legislative" in character—more as matters of adjusting the competing claims of various private interests than of applying policies established by the Congress.[233]

Women's groups, to cite one example, turned to the courts in an attempt to speed up the Title IX implementation process and to force HEW to devote more of its resources to sex (as opposed to other) discrimination issues. Fishel and Pottker conclude:

> Clearly, the filing of lawsuits charging school districts and colleges with sex discrimination or charging DHEW with lack of enforcement of sex discrimination laws has become an instrumental part of the overall political strategy of the groups seeking to achieve educational equity for women.... The power that women generally lack in Congress and executive departments may be partially compensated for by the courts, where the lack of political influence is not as critical a factor in determining outcomes.[234]

As they add, the utility of this tactic does not depend solely on the probability of ultimately obtaining a favorable decision. Rather,

> The filing of a lawsuit charging sex discrimination can ... act as a major public relations technique for women in that it can cause embarrassment to the school, college or agency involved. Indeed, just the threat of legal action can serve as an incentive to policymakers to deal more fairly with women in order to avoid the actual filing of a lawsuit. Even after a suit is filed, there is an incentive to resolve the suit out of court and thus keep the court from monitoring the actions of the school or government agency.[235]

Similar observations can be made about the field of environmental policy.[236]

For these reasons, litigation has some obvious potential advantages as an instrument of political power. Certain groups—examples include the NAACP Legal Defense Fund, the Natural Resources Defense Council and the Public Citizen Litigation Group—have specialized in legal advocacy. Still, some evidence suggests that litigation generally is less effective and more costly than other, more traditional forms of lobbying.[237] Thus, women's groups ususally turned to the courts only after failing to gain ground through the regular political process.[238] Similarly, litigation on educational issues slowed in the mid-1970s, in part because legislatures had become more responsive to the causes of advocacy groups.[239]

A residue of restraint. As the foregoing accounts suggest, the judiciary has generally upheld, or elaborated upon, agency interpretations of regulatory statutes. Not since the 1930s has it often viewed the outcomes of administrative rulemaking procedures with a critical or skeptical eye. This assessment holds even though the present Burger court is generally regarded as more "conservative" than its predecessor, the Warren court, and despite a shift on the part of the Congress and the White House from regulatory expansionism to regulatory relief. Thus, even though every administration since Nixon's has given increasingly closer scrutiny to agency rules and regulations—as *Chapter 6* of this study indicates—and the Congress itself has adopted or proposed a number of measures aimed at regulatory reform, the federal courts have been marching to the beat of a different drummer. The *Wall Street Journal* commented in mid-1981 that

> While the President moves to ease regulations and Congress isn't far behind, government regulators have won almost every case they have had in the Supreme Court this term.... The decisions don't mean the Justices support heavy regulation of business. But the decisions indicate a high-court view that in many cases, regulatory agencies haven't abused the power Congress gave them.[240]

Indeed, from the standpoint of the states and localities, the federal judiciary can aptly be described as a part of the problem, rather than a part of the solution. In the field of grant law, for example, the Reagan White House and the judiciary are like

> two ships passing in the night. While we see, on the one hand, an administration determined to transfer authority in federal grant administration from the national government to the states, we also see, on the other hand, the continuation of a remarkable progression of federal court decisions interpreting federal substantive law in a manner that extends and intensifies the burdens and responsibilities of federal grantees.[241]

On the other hand, these generalizations—like any others—are subject to exceptions. The *NLC* case, mentioned previously, is certainly one; the *Pennhurst* decision, discussed in *Chapter 2*, is another. Each placed modest restrictions on the scope of Congressional authority under the commerce and spending powers respectively.

Even more to the point, in a series of cases concerning the handicapped discrimination requirements imposed under Section 504, the courts have narrowed interpretations of statutory intent, leading to important changes in federal rules as a consequence. In *Southeastern Community College v. Davis* (1979), the Supreme Court held that colleges need not totally ignore the disabilities of handicapped students or make major modifications in their academic programs in order to allow such students to participate. Drastic efforts for "affirmative action" were not necessary. Rather, Justice Powell wrote, Section 504 and its implementing rules simply forbade assuming that an otherwise qualified handicapped person was disqualified solely by reason of his or her handicap—that is, truly prejudicial actions were barred. At issue in the case was the refusal of a college to admit a deaf student into a nursing program on the grounds that she would not be able to function effectively in clinical situations, where lip reading is often impossible.[242]

The *Davis* holding was a comparatively narrow (and very imprecise) one and had little impact on the subsequent decisions of many lower courts.[243] However, it did provide the foundation for a more far-reaching decision, in *American Public Transit Association v. Lewis* (1981), that the U.S. Department of Transportation's 504 regulations had exceeded statutory bounds. Section 504, the U.S. Court of Appeals in Washington held, provided no foundation for stringent and costly rules requiring that all transit facilities be made accessible to the handicapped. The court based its decision on the 1979 ruling that "neither the language, purpose nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." If a transit system refused to take "modest affirmative steps" to offer transportation to handicapped persons, the court said, it might well violate Section 504. But DOT's regulations were deemed excessive in requiring extensive modifications of existing transit systems and in imposing heavy financial burdens on local transit authorities.[244] Following this decision, the Reagan Administration prepared revised rules offering communities far more flexibility in meeting the special transportation needs of handicapped and elderly residents.[245]

This particular decision fit well with the administration's own policy preferences. However, in April 1983, a U.S. District Court struck down a different set of 504 rules favored by the White House. These required hospitals receiving federal aid to post notices stipulating that deformed babies were to be provided with all necessary life-saving care and listing a "hot line" number for anonymous reporting of any violations. The rules were issued by the Reagan Administration when a child, born with Down's syndrome and a blocked digestive tract, died after its parents refused to give their consent for an operation. Although Judge Gesell confined his legal ruling to questions of regulatory procedure—charging federal health officials with "hasty" and "ill-considered" action—he added that "many would argue that had Congress intended section 504 to reach so far into such a sensitive area of moral and ethical concerns it would have given some evidence of that intent."[246]

Other cases may be cited where federal courts have rejected extremely broad interpretations of legislative intent, sometimes overturning agency rules as a result. As *Chapter 2* indicates, a number of courts held in the mid-1970s that the Environmental Protection Agency lacked authority under the 1970 *Clean Air Act Amendments* to force states to implement federally-drafted transportation control plans. Some, but not all, district courts have concluded that the Department of Education's rules barring sex discrimination in intercollegiate athletics impermissibly intrude into an area where the national government provides no financial aid, and hence is not subject to national regulation.[247] Most recently, the Supreme Court held that federal agencies need not consider "psychological stress" among the environmental impacts that must be considered under the *National Environmental Policy Act*.[248]

These cases do not alter the more general interpretations presented above, however, because they are departures from the ususal patterns of judicial aquiescence or activism. At the same time, they show that traditional doctrines of administrative law—including the hoary "transmission belt" theory—are not yet wholly lifeless. They indicate that judges (like legislators and bureaucrats) may differ in their predisposition and the manner in which they respond to specific issues. They also confirm the conclusion of one noted expert that the present condition of administrative law is badly "fragmented" and "disjointed."[249]

ENFORCEMENT: THE WEAKEST LINK

Theory and Practice

On paper, federal regulations often appear to be extremely detailed, demanding, and intrusive, as the foregoing discussion suggests. And so they are, when viewed in literal—or legal—terms. Yet, at the same time, their practical effect is frequently much smaller than a reading of the fine print might suggest. When it comes to monitoring state and local (or private sector) adherence to national requirements, Washington's monster often ends up looking like a paper tiger. Enforcement thus appears to be the weakest link in the chain of implementation.

The environmental field, to cite one important example, is marked by extremely tough-minded and uncompromising statutes. Yet, as the Conservation Foundation has said, "it appears that ... regulation involving everything from drinking water to public lands management tends to break down at the point of enforcement."[250] The GAO agrees that, in the case of both the clean water and safe drinking water programs, EPA's enforcement actions have ranged from none to minimal and were not as timely or effective as they should have been.[251] A recent GAO assessment of the federal-state pesticide control program indicates that it, too, is not being enforced adequately.[252]

Enforcement has been limited even though many important environmental statutes established firm deadlines for attaining national goals and threatened harsh penalties for noncompliance. The 1970 *Clean Air Act* was to assure "healthy air" by 1975; the 1972 *Federal Water Pollution Control Act* was intended to make the nation's major waterways "fishable and swimmable" by 1981 and to eliminate the discharge of *all* pollutants by 1985. These goals—which appeared to many to be impossible to attain at the time of their adoption—have proven to be so in practice. In 1977, Congress extended the air quality deadlines to 1982 and, for 31 states with particularly difficult pollution problems, until 1987. Late in 1982, however, EPA estimated that as many as 600 counties still were in violation of the standards for one or more pollutants.[253] Another extension of deadlines was being considered. This experience certainly calls into question the practical utility of stringent deadlines and standards. As one assessment notes:

> The principal regulatory innovations of the 1970 *Clean Air Amendments* were the use of legislatively set, uncompromisable, health-protection goals, and rigid deadlines to force action. And the principal fact of life since 1970 has been the periodic postponement of deadlines and revisions of timetables by Congress, the courts, and EPA. This observation does not by itself demonstrate that the CAA was necessarily unwise in setting these rigid deadlines; and it certainly does not suggest that it was unwise to relax the deadlines as it has become clear with experience that they would not or should not be met. But the experience so far with the CAA does suggest that setting rigid deadlines and constraining the regulatory authorities do not do much to overcome the basic problems with regulation in this area.[254]

Regarding water pollution control efforts, the GAO has commented that

> only 37% of major municipal treatment facilities were in compliance with the July 1, 1977, deadline requiring secondary treatment. This deadline was extended to 1983 and then to 1988, under certain conditions.... [T]he 1988 deadline ... may have to be further extended.[255]

GAO also noted that effective treatment plant operation and maintenance are necessary to sustain compliance over the long term. Past studies have shown serious shortcomings in this regard.[256]

A similar story may be told in other regulatory areas. Regarding civil rights, a 1977 report of state advisory committees stressed that

> the unfinished business of achieving compliance with civil rights laws remains a formidable task for all of America's citizens and their layers of government, despite visible progress in certain critical areas such as voting rights, public accommodations, and public transportation.... More and more subtle forms of discrimination continue to materialize, requiring ever more stringent enforcement to ensure compliance with the law.[257]

In this area, too, a variety of intergovernmental regulatory efforts are faulted. For example, many school systems have not complied fully with the requirements of the *Education for All Handicapped Children Act*. Under the 1975 act, Congress stipulated that every handicapped child from age three to 18 would be offered a "free, appropriate" public education by September 1, 1978. However, the Office of Special Education (OSE) did not issue final program regulations until August 1977, leaving state and local education agencies only 39 days to comply with most of the statute's complex procedural requirements. This and other administrative delays were compounded by OSE's ineffective monitoring of state and local actions during the crucial early implementation period and its failure to impose the funding penalties provided by law where violations had occurred.[258] As a consequence, the objectives of the program will not be fully realized until the mid-1980s at the earliest.[259] An outraged coalition of advocates has labeled the performance of federal, state, and local agencies a "national disgrace" and described the federal Bureau of Education for the Handicapped as "floundering."[260]

This is not to say that such requirements are always ineffective. For example, one can point to the desegregation of Southern schools in conformance with Title VI of the *Civil Rights Act* as an outstanding example of regulatory accomplishment. However, school desegregation can also be regarded as another "exception that proves the rule." Many Northern schools have become *more*, not less, segregated over this same period,[261] and Title VI has not achieved dramatic results in other kinds of federal assistance programs. A comprehensive report by the U.S. Civil Rights Commission, in 1975, summarizing the first decade of experience, stressed the lack of government-wide leadership for the enforcement of its requirements. There was, the report concluded,

> a lack of direction as to what constitutes discrimination and how it should be eliminated. As a result, neither federal officials nor recipients of their programs have fully understood the nature of their duties.... In the aggregate these compliance programs have held out false promises for many minorities and women who have been frustrated in their attempts to participate in the benefits of federally assisted programs.[262]

Much the same conclusion was reached in a 1980 study. It found that some federal agencies did not know which of their programs were subject to the law and sometimes did not know (and could not determine) if nondiscrimination requirements were being carried out by their grantees.[263]

As a general rule, then, federal intergovernmental regulations have proven difficult to enforce, statutory deadlines have been repeatedly extended or ignored, and compliance—though probably better than one would anticipate, given the generally haphazard character of federal supervision—has fallen short of official expectations. Such shortcomings in performance account for the Doctor Jekyll and Mr. Hyde reputation of the Office of Civil Rights (OCR) and many other federal regulatory agencies. OCR has been regarded as a hotbed of regulatory zealots by one set of critics and as a timid, lumbering bureaucracy by another. Both are correct—but each is looking at a different aspect of the process. As one analyst observes,

> Those who fault the agency's excessive zeal generally point to the ambitious reach of its formal regulations and official statements of policy—often without noticing that it has rarely enforced those demanding standards in practice. Conversely, OCR's constituents have directed the bulk of their criticism at this undeniably poor enforcement record.[264]

Several factors contributing to enforcement difficulties—including administrative and technical problems, a lack of adequate resources, and political obstacles to the imposition of sanctions—are described below.

Administrative and technical infeasibility. One reason that regulatory efforts bog down at the enforcement stage has to do with the scope of the task. Washington's reach, to put matters bluntly, has often exceeded its grasp.

Sheer numbers alone provide one indication of the magnitude of the enforcement problem. There are some 32,000 potentially hazardous waste sites to be monitored, some 15,000 sewage treatment plants to be upgraded, nearly 300 species of plants and animals to be protected, and more than 3.5 million workplaces—with more than 40 million employees—to be inspected for health and safety. The vast majority of the nation's population is entitled to special protection against discrimination on the basis of race, ethnicity, sex, age or handicap in employment or in projects financed by some 400-odd federal aid programs. Moreover, these individuals, workplaces, species, and dumps are scattered across a nation of continental proportions. It is no wonder that Washington has increasingly relied on state and local governments to carry out its regulatory policies. But even here there are 50 of the former, and more than 80,000 of the latter, to be monitored.

What all of this means is that the chances of a federal inspector coming to knock on your door are pretty small, whether you are a business owner, public official, or private citizen. Under OSHA, for example, the average workplace is likely to be inspected only once in several decades; this fact, some believe, accounts for its failure to have much impact on work-injury rates.[265] Similarly, in dealing with their dozens, hundreds, or even thousands of grant recipients, federal agencies are forced to rely on program reports that often are

> nothing more than sketchy, self-serving statements about the grantee's progress in achieving its goals and commitments.... Deficiencies could be spotted by on-site program reviews, but most grantees are never audited or inspected....[266]

An alternative enforcement technique is provided by the many regulatory statutes that authorize civil suits as a means of citizen-initiated enforcement and by court decisions that made it easier to challenge grant-related actions. The threat of such litigation probably increases pressure to comply. At the same time, the larger number of cases resulting has added to lengthy judicial backlogs.[267]

Thus, as Peter H. Schuck comments, "other things being equal, the more numerous the firms, people or processes that must be regulated, the less likely it is that regulation will be effective." Indeed, he adds that in some cases "the number of entities may be so great as to make it difficult or impractical for the regulator even to *identify*, much less regulate, them all."[268] The handicapped education law, PL 94–142, offers an illustration. The Department of Education believes that there are about 6.2 million children requiring services under the act, but state screening efforts have identified only 3.9 million such students.[269] Both levels contend that their total is the more accurate one.

The diversity of local circumstances also can hamper effective administration and enforcement of national regulations. The *Davis-Bacon Act*, adopted in 1931, requires the Department of Labor to determine locally prevailing wages for construction work in each of the nation's 3,000 counties. However, according to a GAO assessment,

> After nearly 50 years of administering the *Davis-Bacon Act*, the Department of Labor has not developed an effective system to plan, control, or manage the data collection, compilation, and wage determination functions.... Evaluation of the wage determination files and inquiries regarding 73 wage determinations at five regions and headquarters showed that, in many instances, wage rates were not adequately or accurately determined.[270]

Furthermore, GAO concluded that

> given the diverse characteristics of the construction industry, the differing wage structures on the varying types of construction, and the voluntary aspect of collecting wage data from contractors in every county throughout the nation, we do not believe that the act can be effectively, efficiently and equitably administered.[271]

For this reason and others—especially *Davis-Bacon's* inflationary impact on government construction projects—GAO recommended that the statute and 77 related provisions in other statutes be repealed.

The sheer volume of regulations also can hamper enforcement and compliance because of inconsistencies in specific provisions or even because of conflicting aims. The former problem, that of inconsistency, has been a major problem with many crosscutting requirements. Agency interpretations of the same statutory language often differ markedly, and OMB lacks the authority to standardize them.[272] Differing agency rules also long hampered implementation and enforcement of equal employment opportunity regulations under Title VII.[273]

An example of the latter difficulty, that of interprogram conflicts, was provided by a Rand study of federal education programs. School districts are required to scatter ethnic students among local schools to foster integration, but are forced to group them by language categories to comply with bilingual education rules. "This kind of situation," the study stressed, "can only result in poor state and local implementation of federal programs."[274] Similarly, some federal pollution controls seem to have had the perverse effect of adding to pollution. One comprehensive analysis stressed that

> The environmental laws of the 1970s created a single-purpose approach to pollution control. Sometimes this meant that complying with one law or regulation would cause a conflict with another law. Pollution control laws have not only increased the volume of wastes that must be disposed of but, in addition, have prohibited or severely restricted available disposal options. This approach has caused communities and industry to select or consider disposal methods that may not be environmentally safe.[275]

Even when their specific objectives are not mutually incompatible, the piling up of un- or under-funded mandates creates competition among beneficiary groups for scarce resources.[276] Under federal education laws, for example, the handicapped, women and girls, racial minorities, the non-English speaking, and the economically disadvantaged can each rightfully claim a larger share of education dollars. Furthermore, from the standpoint of state and local governments, these claims all compete with the collateral need to meet costly standards in such areas as sewage treatment, drinking water quality, and transportation access for the handicapped. All claimants cannot be satisfied simultaneously. Under these circumstances, then, the sheer number of programs raises significant obstacles to implementation and compliance.[277]

Finally, ease of enforcement also depends, at least in part, on the character of the requirements themselves:

> When the regulations are simple, violations are easy to find and prove, and compliance or noncompliance is a matter of will more than of feasibility, then enforcement can proceed as regulatory theory says it should. But when the regulations are so complex that it is not clear what any particular person must do to comply, when noncompliance is not easy to demonstrate, or when there are any number of technical and economic excuses for noncompliance, then enforcement is a difficult and time-consuming process. If, in addition, the rules themselves are changing continually in pursuit of an evolving goal or in light of unfolding information, enforcement ... becomes impossible.[278]

There are many instances in which specific statutes were enacted by Congress without much concern for potential pitfalls of implementation and enforcement. For example, in adopting the *Clean Air Act Amendments of 1970,* a Congressional desire for dramatic action led it to disregard possible technical obstacles—including the question of whether national air quality standards could be attained under even the best possible circumstances.[279] Thus, the history of the program has been described as an attempt to "implement policy beyond capability."[280] Similarly, the *Clean Water Act* required municipalities to construct (or upgrade) wastewater treatment plants to meet national water quality goals, and more than $28 billion has been expended toward this objective. Yet, many of the new plants built have seldom or never worked as expected. Deficiencies in design account for many of these shortcomings.[281] Technical difficulties also have hampered the operation of lift-equipped buses intended to serve the handicapped, and the health planning agencies mandated by federal law have not been able to control hospital costs.

Limited resources. The scope of the regulatory enforcement task also must be measured against limitations on the resources available to governments at each level. Agencies often do not possess either the personnel or the funding levels necessary to assure full compliance.

Recognition that this is a serious shortcoming may come as a shock to those who believe that federal agencies are bloated with thousands of unnecessary, intervention-minded bureaucrats. Staffing for regulatory agencies did more than triple between 1970 and 1980, and there was a more than six-fold increase in positions with the agencies oriented toward social (as opposed to economic) regulatory objectives.[282] Still, the growth of national responsibilities has outpaced the rise in federal personnel in many regulatory areas. Sheer manpower is one consideration; expertise is another. A shortage of technical experts, or a lack of adequate training, also has been identified as an obstacle to federal monitoring and enforcement.[283]

To cite just one case, EPA regional offices have lacked adequate staff to authorize, review, and monitor state hazardous waste programs. In 1979, EPA officials indicated that they would require from four to six times the number of aides to carry out their responsibilities effectively.[284] Similar observations have been made about staffing shortfalls for a great many other environmental, civil rights, and health regulation programs. And these shortfalls are not surprising, given the budgetary constraints of the past half-decade as well as the traditional Congressional opposition to enlarging the federal work force.[285]

Like their national counterparts, state and local governments also may be hindered in their efforts to meet regulatory standards by a lack of adequate resources. In a comprehensive survey of five major programs, the GAO found that state environmental agencies are plagued by staffing problems and difficulties in obtaining funding.[286] Because of comparatively low salaries, states cannot compete successfully in the marketplace for professional engineers. Consequently, program continuity is hampered by high levels of turnover and staff vacancies. Although Washington provides grant funds to help implement many environmental programs, uncertainties about future federal funding levels make program planning difficult. Furthermore, annual program grants are often issued late, which has sometimes resulted in the termination (or threatened termination) of state employees.

A lack of resources also has limited compliance with the requirements of the *Education for All Handicapped Children Act*. PL 94-142 required that an "appropriate education" be made available to *all* handicapped children by September 1, 1978. However, a shortage of funds needed for personnel, space, and supplies has been the principal barrier to full implementation. Federal grants have been significantly below authorized amounts, and most state education funding is not increasing rapidly enough to serve all handicapped children in the near future.[287]

Although it can affect all state and local governments, as well as Washington, a lack of expertise is especially likely to be a problem for the nation's many small jurisdictions. For example, the 1974 *Safe Drinking Water Act* developed standards to assure the helthful quality of public water systems. However, compliance with the requirements, in thousands of cases, appears to be the exception. Many of the violators are small systems, which often lack full-time and properly trained operators.[288] In the same way, the development of new sewage treatment plants by small communities has been difficult, GAO found, because

> the sewer district officials were primarily local residents having little or no sewer system expertise. Many of these officials were highly frustrated by the lack of state and EPA help with their construction efforts. Unfortunately, state and EPA officials typically do not have time to help small communities.[289]

In some instances, federal and state agencies have competed with each other for a scarce supply of expert personnel. The Office of Surface Mining experienced some difficulty in filling many of its staff positions in both headquarters and regional offices. It solved this problem, in part, by hiring away inspectors from state strip mining control agencies. Some states, not surprisingly, protested that they had borne the cost of providing training, but were unable to match higher federal salaries.[290]

Political liabilities. Enforcement also can be hindered by political considerations. The basic problem is that, although the general objectives of a program may be popular, the threat or imposition of sanctions almost universally is not. No one—from the member of Congress to the mayor and proverbial "man in the street"—likes to hear that his or her community is about to lose education, highway, or health funds, although such grant cutoffs are the most important form of regulatory sanction. For this reason, there is an extensive historical record demonstrating that such penalties are very seldom imposed.[291] Neither do most officials and citizens like to find themselves threatened with fines or monetary damages, or to have their schools or other public facilities brought under the watchful eye of a federal judge.

Enforcement actions, then, often generate political resistance at every level. First, it may be doubted that Congress itself always intended to be taken at its word in adopting tough standards and harsh penalties. To many legislators, a regulatory policy may simply be a symbolic signal to those constituents who advocate a particular cause; to others, it may be nothing more than the return of a favor to a colleague for his or her support on some other issue. Given the political environment in which such policies are conceived, it is not surprising that many are not rigorously enforced.[292]

Second, executive branch officials do not always have sufficient ardor for the performance of their assigned tasks. This charge, at least, was leveled in a study of Title IX. The Office of Education, Fishel and Pottker concluded,

> has demonstrated no real interest in the problem of sexism. The strong and close ties held by OE officials with various parts of the male-dominate education community has probably been responsible for the unaggresive performance of OE.[293]

They also argue that top administrative officials have never regarded the mission of the Office of Civil Rights to be "strict and total compliance with the law of the land." Rather, "political expendiency" has been the "guiding principle" of OCR's operation.[294]

As a general rule, it is probably true that agency personnel have a stronger commitment to the principal objectives of their programs than to the multitude of secondary goals added on through crosscutting and other kinds of new regulatory requirements. Highway officials, for example, might reasonably be expected to be more concerned with building and maintaining the nation's roads than with worrying about whether contractors have an appropriate race-age-sex-mix among their employees, or whether a new road might damage an interesting archeological site, or whether traffic loads will add to air pollution, or if a particular state has removed enough of its billboards or is enforcing the 55 mph speed limit adequately. The simple fact, as OMB has stressed, is that requirements of these kinds compete with an agency's primary mission for limited amounts of time, manpower and funds.[295]

Even when their own personal commitment is strong, however, federal officials may be reluctant to adopt a stance as tough enforcers, and there are good programmatic and political reasons for not doing so. Because they depend upon state and local governments to achieve their own agency's mission, federal regulators need to maintain some kind of a working partnership. Harsh sanctions undermine the bonds needed to make programs work and, if they result in grantee withdrawal, can totally frustrate the attainment of national objectives. Moreover, some pain is inflicted on those the federal government intended to help:

> Whenever a fiscal sanction is imposed the individual program beneficiaries are the losers .... The paradox is, of course, that the grantor has ended up punishing the very persons that it sought to aid through the federal standards and their enforcement.[296]

In the *Clean Air* and *Clean Water Acts*, as well as other partial preemption programs, federal requirements are backed by a dual sanction. The threat of withholding funds is tied to federal assumption of state program implementation. Yet, federal officials are reluctant to take this step because

> withdrawing federal aid places EPA officials in the position of performing pollution control activities for the states when EPA is no better equipped with adequate resources (funds and personnel) than the states and is certainly ill-equipped to deal politically with either governmental

> or private polluters in the states. If EPA officials had to carry out pollution control and abatement for a state, it would slow down activities both in the state and nationally, because EPA officials would have to put aside their own work to do the state's work.[297]

Similarly, the Department of Labor has refrained from being "tough" on the states in administering OSHA, in part because

> federal officials sensed that they might need state help to make the program work. Some state programs had acquired decent reputations for effectiveness. If the states did not participate, it was not clear to OSHA administrators that they could extract enough resources from Congress to enforce the law vigorously.[298]

Perversely, as these comments might imply, the larger the sanction, the more damage can be done; hence, the less likely penalties are to be imposed. This same principle lies behind nuclear deterrence, and gives rise to what some program analysts describe as the "atom bomb" effect.[299] Initially, the 55 mph speed limit law required the withholding of *all* highway construction grants from noncomplying states. In practice, the economic and political repercussions of such a funding cutoff would be so severe that state officials regarded the provision as an "empty threat." Still, it was a threat they resented. GAO recommended that enforcement would be improved if the law took a more cooperative approach,[300] and the penalty was in fact reduced in 1978. In the case of the national health planning act, some states appear to have gone along with federal requirements simply to avoid losing public health grants, but without making a real commitment to the success of the program. For this reason, Washington might be better off encouraging, rather than coercing, state participation.[301]

In some instances, a fear of the political backlash that could result from tough enforcement actions has forced program advocates to tread lightly. This was the case in late 1982 and early 1983, when many environmentalists—who had often charged the Reagan Administration with weakening the national commitment to anti-pollution laws— opposed its threat to impose sanctions under the *Clean Air Act* against hundreds of counties that had failed to meet air quality goals. The penalties prescribed by the law, which EPA viewed as mandatory, included cutoffs of highway and pollution control funds and a ban on new construction. Many members of Congress and environmental group lobbyists contended that the administration's action was politically motivated, intended to force a weakening of the statute.[302] The crisis was resolved in June 1983, when William D. Ruckelshaus—who had replaced Anne Burford as EPA's administrator—reversed his predecessor's policy position.[303]

Finally, federal officials, being political creatures, cannot afford to ignore the possible impact of tough actions on their status and careers. Enforcement of school desegregation in the North ran aground when the Office of Education, in 1965, threatened to cut off grant funds to the City of Chicago. As the story goes, Mayor Daley—then one of the nation's most powerful local political leaders—threatened to pull Congressional votes from the *Highway Beautification Act* (which was one of Lady Bird Johnson's favorite programs) if the sanctions were imposed.[304] President Johnson barred OE action, showing that

> political pressure could be used (by and on the President down) to stop desegregation efforts. School districts could push resistance to federal implementation outside the education profession .... The message was clear: ... if HEW officials did not want to be burned, they were wise to handle the northern and western states with care and some distance.[305]

Two Saving Graces

As the foregoing account suggests, federal regulatory efforts have been hampered by weak enforcement, which is itself a product of the magnitude and complexity of the task, limited resources, and the political liabilities of imposing sanctions. Partially for these reasons, accomplishments have often fallen well short of specified national goals.

Two qualifications to this general conclusion are in order, however. First, at least from the standpoint of some observers, the lack of enforcement is the "saving grace" of the intergovernmental regulatory system. Given the multiplicity, excessive rigidity, and specificity of federal rules, enforcement shortcomings may be necessary and desirable. Because Congress, bureaucrats, and the courts seem to be inclined to over-regulation—and are often unwilling to review their handiwork to undo past errors—it may be just as well that the enforcement process is biased in the opposite direction.

Thus, to Richard Cappalli, the "secret ingredient" that long allowed the grant system to function somewhat smoothly was the tacit understanding that many aid conditions were simply formalities:

> In other words, while everyone "agreed" to comply with dozens of grant-in-aid "strings," few grantees were even remotely aware of the terms and details of most of the federal mandates.[306]

Similarly, most federal grantors left unread much of the voluminous paperwork submitted for their review. The University of California-Riverside study of the impact of federal and state mandates on local governments also concluded that

> one of the coping strategies which local jurisdictions employ when faced with the cost overload or unpopularity of mandates is non or partial compliance. In a number of cases, the field associates reported that the local government officials they interviewed were just not familiar with the mandate. This experience was true, of course, for minor procedural mandates and for some rather esoteric program mandates. Some mandates were ignored because they were considered obsolete: an example is the requirement in one state that all dogs in the city be counted each year.[307]

In the late 1970s, however, this attitude of mutual accommodation and acceptance was dissolving. Congress, federal auditors, interest groups and the courts became much more insistent on full compliance with the letter of the law.[308] This new insistence helps to account for the simultaneous backlash against excessive regulation and the growing clamor for regulatory relief and reform.

A second saving grace is that there is reason to believe that the actual levels of compliance are somewhat better than the enforcement record might seem to suggest. It has been observed that

> enforcement is not the sole means of assuring compliance with regulatory directives. Businesses obey regulations for a host of reasons—moral or intellectual commitment to underlying regulatory objectives, belief in the fairness of procedures that produced the regulations, pressure from peers, competitors, customers or employees, conformity with a law-abiding self-image—in addition to fear and punishment. It is a commonplace that no regulatory command will succeed without substantial voluntary compliance.[309]

The general goals, if not the specific provisions and procedures, of many federal regulatory programs are now widely accepted. Compliance, then, does *not* require close scrutiny or each and every case; rather, it depends upon a sifting mechanism to identify and punish the exceptional violators. Most people, for example, drive at a reasonable speed and obey speed limit laws as matter of safety and conscience—coupled with fear of the occasional speed trap. On the other hand, as national experience during the Prohibition era shows—and the effort to enforce the 55 mph limit in some states indicates—rules that are too widely flaunted cannot be enforced by normal regulatory mechanisms. "Like traffic laws, regulations are seldom enforced," one analyst has commented. "Far from being able to do the whole job, regulatory agencies can do so little that they must be used carefully if they are to have any effect. Their first task must be to curtail the worst abuses, not wasting time on unimportant issues . . . ."[310]

If businesses can be expected to comply voluntarily with many regulations, a stronger presumption in favor of obedience must be granted to most governmental jurisdictions. After all, they are open to political pressures from the same voters and pressure groups that influence national policy. Indeed, in many cases, state and local governments pioneered the new wave of social regulation. Prominent examples include California in air pollution control, occupational safety and health, and hazardous waste disposal; Massachusetts in education for the handicapped; Minnesota in water pollution control; New Jersey in health care cost containment; and, West Virginia in surface mining regulation. Nearly all areas of racial, age, and sex discrimination were addressed by many states before Washington entered the scene. For example, Title VII of the 1964 *Civil Rights Act* was closely modeled on state fair employment practices legislation. In other instances, federal rules and regulations have produced supportive constituencies, which can be counted on to further the objectives of national programs even in the absence of regular enforcement procedures. Thus, one field study concluded that "it is obvious that many mandates have been institutionalized and the activities introduced by the mandates would continue even if the mandate were withdrawn."[311] As a consequence, the Reagan Administration's policy of deregulation has had very little impact on such states as New York:

> Crosscutting regulations, such as those concerning discrimination, environmental protection, and safety standards, are generally enforced by the state, not because of federal requirements, but because citizens support them. New York was in many instances a model for the rest of the nation during the years of increasing federal regulation and continues to regulate activity more than many other states.[312]

The overall lesson, then, is that state and local compliance with federal regulations depends in part upon the commitment of state and local officials, and the citizens they represent, to regulatory objectives. Local political factors—which vary from program to program and jurisdiction to jurisdiction—are largely beyond the control of federal agency administrators.[313] On the whole, federal regulators are either unable or unwilling to monitor performance closely enough to assure adherence to federal directives. In some instances, however, state and local compliance is probably greater than would be predicted, given the limitations of enforcement efforts.

CONCLUSION

Over the past decade or more, the nation has undertaken a new experiment in social policy, and entered a new stage in its intergovernmental relationships. In the late 1960's, and through at least the mid-1970s, Washington turned increasingly to programs based upon the "stick" of regulation rather than the "carrot" of financial subsidy in its dealings with state and local governments. Many new programs, especially in the areas of environmental protection and civil rights, represented a sharp departure from past practices.

How has this effort succeeded? Generalization is difficult, given the diversity of programs, but the foregoing discussion certainly illustrates a number of potential pitfalls. Regulatory implementation, as it turns out, is a demanding task for all concerned: federal agencies, state and local governments, and the courts. Many regulatory programs, to summarize briefly, tend to be overly detailed, poorly enforced, and slow to get off the ground. Years may pass before statutory language is translated into specific, enforceable rules. Agencies and the courts often develop inflexible, particularistic standards that provoke political opposition and promote litigation. Many of the resulting rules, however, are never fully implemented. Agencies typicially lack the resources that would permit a close monitoring of actual performance and lack the will to impose tough sanctions on violators.

Consequently, almost no one is satisfied with the final product. Program advocates, while staunchly defending program goals, charge federal, state, and local mismangement and bemoan inadequate enforcement. State and local governments complain about "nit picking" rules poorly suited to their own, often quite varied circumstances; protest against the fiscal burdens of meeting federal requirements in an era of scarce resources; and challenge regulations that violate areas of state sovereignty or statements of legislative intent. *All* parties agree that delays and uncertainties hamper effective administration.

These observations signal a warning about the possible limitations of a regulatory approach to federalism. Just as an earlier generation of implementation analysts discovered that social problems cannot be solved simply by "throwing federal money" at them, more recent research indicates that "throwing rules" at problems does not eliminate them either. On the contrary, largely as a result of these efforts, the old ideal of "cooperative federalism" has too often been replaced by new patterns of attempted coercion and protracted conflict. Thus a new critique, rooted in considerations of intergovernmental relations, must be added to the already voluminous criticism of regulatory performance by economists, lawyers, historians, the business community, activist groups—and many regulators themselves.

However, the diagnosis of these difficulties does not easily translate itself into specific remedies. Many economists, in particular, believe that most regulation should be replaced with "market-like" incentive systems. However, it cannot be said with assurance that intergovernmental regulation is any more failure-prone than grants-in-aid. On the one hand, efforts at coercion do seem to spark high levels of resistance and to slow down the implementation process. On the other hand, the threat to impose sanctions—despite all of the limitations described above—may well assure somewhat greater acceptance of national goals than the more nearly voluntary strategy of assistance subsidies.

Neither has it been demonstrated that intergovernmental regulatory programs work more poorly than those administered directly by federal agencies themselves. This is true even though many implementation analysts warn against the extra confusion that can result from adding more participants to the implementation process. Again, a two-fold argument is plausible. State and local involvement may, on the one hand, make program outcomes more difficult to control. But, at the same time, performance may be better where the federal government is able to enlist state participation and take advantage of state administrative and fiscal resources.

What can be said, with some assurance, is that many of the factors that spurred political acceptance of intergovernmental regulation—identified in an earlier chapter in this report—work against effective regulatory performance. Because of the strong political symbolism involved in taking tough stands against serious social ills, and because the costs of regulation are borne chiefly by state and local governments or the private sector, legislators often give too little attention to possible pitfalls in program design. These weaknesses generally become apparent during the implementation process. Confrontations with administrative, fiscal, technological, legal, and political constraints can often be delayed—but they cannot be put off indefinitely.

FOOTNOTES

[1] Alfred A. Marcus, *Promise and Performance: Choosing and Implementing an Environmental Policy* (Westport, CT: Greenwood Press, 1980), p. 3. Emphasis added.

[2] Walter Williams, *The Implementation Perspective* (Berkeley, CA: University of California Press, 1980), p. 1.

[3] Stephen Bailey and Edith Mosher, *ESEA: The Office of Education Administers a Law* (Syracuse, NY: Syracuse University Press, 1968).

[4] Williams, *Implementation Perspective*, p. 1.

[5] Martha Derthick, *New Towns In-Town: Why a Federal Program Failed* (Washington, DC: The Urban Institute, 1972).

[6] Jeffrey L. Pressman and Aaron B. Wildavsky, *Implementation* (Berkeley, CA: University of California Press, 1973).

[7] James S. Larson, *Why Government Programs Fail: Improving Policy Implementation* (New York: Praeger Publisher, 1980).

[8] Richard E. Newstadt, *Presidential Power: The Politics of Leadership* (New York: Signet Books, 1964), p. 42.

[9] Pressman and Wildavsky, *Implementation*, pp. 94-110.

[10] Steven Lewis Yaffee, *Prohibitive Policy: Implementing the Federal Endangered Species Act* (Cambridge, MA: MIT Press, 1982). p. 7.

[11] Williams, *The Implementation Perspective*, p. 44.

[12] Derthick, *New Towns*, pp. 93-94.

[13] Jerome T. Murphy, "Title I of ESEA: The Politics of Implementing Federal Education Reform," *Harvard Educational Review* 41 (February 1971), p. 60.

[14] Jeffrey L. Pressman, *Federal Programs and City Politics: The Dynamics of the Aid Process in Oakland* (Berkeley, CA: University of California Press, 1975), pp. 84-104.

[15] Theodore J. Lowi and Benjamin Ginsberg, et al., *Poliscide* (New York: Macmillian Publishing Company, 1973), p. 27.

[16] Stephen Breyer, *Regulation and Its Reform* (Cambridge, MA: Harvard University Press, 1982), p. 2.

[17] *Ibid.*

[18] Robert W. Crandall, "Has Reagan Dropped the Ball?" *Regulation* (September/October 1981), p. 16.

[19] Lester B. Lave, "Health, Safety, and Environmental Regulations," in *Setting National Priorities: Agenda for the 1980s*, Joseph A. Pechman, ed., (Washington, DC: The Brookings Institution, 1980), p. 159.

[20] "Regulators and the Polls," *Regulation*, November/December 1978, pp. 10-54.

[21] Bruce K. MacLaury, Forward to *The Public Use of Private Interest*, by Charles L. Schultze (Washington, DC: The Brookings Institution, 1977), p. vii.

[22] Frances Gendlin, "A Talk With Mike McCloskey," *Sierra*, March/April 1982, p. 39.

[23] Conservation Foundation, *State of the Environment 1982* (Washington, DC: The Conservation Foundation, 1982), p.2.

[24] U.S. General Accounting Office, *Unanswered Questions on Educating Handicapped Children In Local Public Schools* (Washington, DC: U.S. Government Printing Office, 1981), p. 5.

[25] U.S. General Accounting Office, *Obstacles to Billboard Removal* (Washington, DC: U.S. Government Printing Office, 1978), p.i.

[26] Conservation Foundation, *State of the Environment*, p. 3.

[27] General Accounting Office, *Unanswered Questions*, pp.8-9.

[28] General Accounting Office, *Billboard Removal*, p. i.

[29] National Advisory Council on Women's Educational Programs, *Title IX: The Half Full, Half Empty Glass* (Washington, DC: U.S. Government Printing Office, 1981), preface.

[30] *Ibid.*, pp. 51-52.

[31] For example, a recent Gallup poll conducted for the League of Women Voters found that only 17% of the population understands that the executive branch has the main responsibility for making regulations; even fewer understand the distinction between laws and regulations. See "League of Women Voters Releases New Poll on Regulatory Process," news release, League of Women Voters Education Fund, May 25, 1982.

[32] Felicity Barringer, "If Rules Are Made to Be Broken, so Are Rulemakers," *The Washington Post*, June 25, 1981, p. A21.

[33] "Revenue Sharing Handicap Regulations Put Into Effect," *Revenue Sharing Bulletin*, September 1981, pp. 1, 3.

[34] "Changes Proposed to Government-Wide Handicap Rules," *Revenue Sharing Bulletin*, March 1982, p. 7.

[35] U.S., Congress, Senate, Committee on Governmental Affairs, *Delay in the Regulatory Process*. 95th Cong., 1st sess., 1977, *Study on Federal Regulation*, vol. IV. p. v.

[36] Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Papers*, Volume I (Washington, DC: U.S. Government Printing Office, 1980), p. A-3-27.

[37] Frank J. Thompson, *Health Policy and the Bureaucracy: Politics and Implementation* (Cambridge, MA: The MIT Press, 1981), p. 59.

[38] Yaffee, *Prohibitive Policy*, pp. 58-69.

[39] U.S. General Accounting Office, *Unanswered Questions*, pp. 94-97.

[40] Andrew Fishel and Janice Pottker, *National Politics and Sex Discrimination in Education* (Lexington, MA: D.C. Heath and Company, 1977), p. 133.

[41] U.S. Congress, Senate, Committee on Governmental Affairs, *State Implementation of Federal Standards*, Part 3, *The Resource Conservation and Recovery Act, Hearing before the Subcommittee on Intergovernmental Affairs*, 97th Cong., 1st sess., 1982, pp. 4-5.

[42] Thompson, *Health Policy*, pp. 235-39.

[43] U.S. General Accounting Office, *Issues Surrounding the Surface Mining Control and Reclamation Act* (Washington, DC: U.S. Government Printing Office, 1979), pp. 5-6.

[44] U.S. Congress, Senate, *Delay*, p. iv.

[45] Fishel and Pottker, *Sex Discrimination*, p. 133.

[46] Jeremy Rabkin, "Office of Civil Rights," in *The Politics of Regulation*, James Q. Wilson, ed., (New York: Basic Books, 1980), p. 344.

[47] U.S. General Accounting Office, *EPA is Slow to Carry Out Its Responsibility to Control Harmful Chemicals* (Washington, DC: U.S. Government Printing Office, 1980), pp. 8-18.

[48] *Ibid.*, pp. i, 1.

[49] See Breyer, *Regulation*, pp. 342-343.

[50] See Alan Stone, *Regulation and Its Alternatives* (Washington, DC: Congressional Quarterly Press, 1982), pp. 197, 202-03.

[51] James Q. Wilson, ed., *The Politics of Regulation* (New York: Basic Books, 1980), p. 392.

[52] Jane S. Shaw and Charlene Canepe, "Is the EPA Saddled with More Than It Can Handle?," *Business Week*, May 26, 1980, p. 148.

[53] Charles S. Bullock III and Joseph Stewart, Jr., "When You Can't Do Everything At Once: Policy Implementation Under Conditions of Growing Responsibilities," paper prepared for delivery at the 1978 Annual Meeting of the American Political Science Association, New York City, August 31-September 3, 1978, pp. 2, 32.

[54] Yaffee, Prohibitive Policy, p. 71.

[55] *Ibid.*, p. 105.

[56] Breyer, *Regulation*, p. 109.

[57] Thompson, *Health Policy*, p. 223.

[58] *Ibid.*, p. 232.

[59] *Ibid.*, 239.

[60] *Occupational Safety and Health Act*, 84 Stat, 1594, Section 6(b), (5).

[61] Robert W. Crandal and Lester B. Lave, eds., *The Scientific Basis of Health and Safety Regulation* (Washington, DC: The Brookings Institution), p. 4.

[62] Steven Kelman, "Occupational Safety and Health Administration," in *The Politics of Regulation*, James Q. Wilson, ed., (New York: Basic Books, 1980), pp. 244, 46.

[63] *Ibid.*, p. 249.

[64] Thompson, *Health Policy*, p. 235.

[65] Breyer, *Regulation*, p. 109.

[66] Albert L. Nichols and Richard Zeckhauser, "Government Comes to the Workplace: An Assessment of OSHA," *The Public Interest* 49 (Fall 1979), pp. 48-49.

[67] Selim M. Senkan and Nancy W. Stauffer, "What to do with Hazardous Waste," *Technology Review*, November/December 1981, p. 40.

[68] Charles T. Stewart, Jr., *Air Pollution, Human Health, and Public Policy* (Lexington, MA: D.C. Heath and Company, 1979), p. 121.

[69] Yaffee, *Prohibitive Policy*, pp. 75-85.

[70] *Ibid.*, p. 81.

[71] Laurence E. Lynn, Jr., *Managing the Public's Business: The Job of the Government Executive* (New York: Basic Books, 1981), p. 25.

[72] Richard J. Tobin, *The Social Gamble: Determining Acceptable Levels of Air Quality* (Lexington, MA: D.C. Heath, 1979), pp. xiii-xiv.

[73] Mark F. Engebretson, "Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation," *Harvard Journal on Legislation* 16 (Winter 1979), p. 60, 63.

[74] Martin L. LaVor, "Memorandum to all Minority Members, House Education and Labor Committee," June 14, 1979, cited in Steven Leon Abrams, 'The Significance of Congressional Change for American Public Policy" (B.A. honors thesis, Harvard College, 1980), p. 36.

[75] Abrams, "Congressional Change," p. 30.

[76] "Regulations on Handicapped," *Congressional Quarterly*, January 22, 1977, p. 131.

[77] Califano, *Governing America*, pp. 258-259.

[78] *Ibid.*, pp. 259-261.

[79] Beryl A. Radin, *Implementation, Change, and the Federal Bureaucracy: School Desegregation Policy in H.E.W., 1964-1968* (New York: Teachers College Press, 1977), pp. 92, 146.

[80] Rabkin, "Office of Civil Rights," p. 315.

[81] Peter H. Schuck, "The Graying of Civil Rights Law," *Public Interst* 60 (Summer 1980), p. 48.

[82] *U.S. Weekly Compilation of Presidential Documents*, November 28, 1975, pp. 1326-27.

[83] See also Abrams, "The Significance of Congressional Change," pp. 57-72 and Rochelle L. Stanfield, "Age Discrimination Regulations—They're Turning the Rule Makers Gray," *National Journal*, December 30, 1978, pp. 2066-70.

[84] Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* (Bloomington, IN: Indiana University Press, 1976), p. 5.

[85] Lester B. Lave and Gilbert S. Omenn, *Clearing the Air. Reforming the Clean Air Act* (Washington, DC: The Brookings Institution, 1981), p. 49.

[86] *Ibid.*

[87] Thompson, *Health Policy, p. 47.*

[88] *Ibid.*, pp. 47-48.

[89] U.S. General Accounting Office, *Unanswered Questions On Educating Handicapped Children in Local Public Schools* (Washington, DC: U.S. Government Printing Office, 1981), pp. 29-52.

[90] See Tobin, *The Social Gamble*, pp. xiv-xv.

[91] Lynn, *Managing the Public's Business*, p. 30.

[92] *Ibid.*, pp. 23-24.

[93] *Ibid.*, p. 31.

[94] Roger A. Cunningham, "Billboard Control Under the Highway Beautification Act," *Michigan Law Review* 71 (June 1973), p. 1371.

[95] *Ibid.*, pp. 1299-1300.

[96] Crandall and Lave, *Scientific Basis*, pp. 6, 17.

[97] Thompson, *Health Policy*, pp. 54-62.

[98] Erwin L. Levine and Elizabeth M. Wexler, *PL 94-142: An Act of Congress* (New York: Macmillan Publishing Co., Inc., 1981), p. 123.

[99] Kelman, "Occupational Safety and Health Administration," pp. 242, 260.

[100] Tom Parker, "New HEW Guidelines Pending on Prohibiting Discrimination Because of Physical Handicaps," *Public Administration News and Views*, October 1976, pp. 6, 18.

[101] See Califano, *Governing America*, pp. 258-61.

[102] Liroff, *National Policy for the Environment*, p. 209.

[103] *Ibid.*, pp. 10-11.

[104] Yaffee, *Prohibitive Policy*, pp. 13-14.

[105] Timothy B. Clark, "Access for the Handicapped—A Test of Carter's War on Inflation," *National Journal*, October 21, 1978, p. 1673.

[106] Gordon J. Fielding, "Transportation for the Handicapped: The Politics of Full Accessibility," *Transportation Quarterly* 36 (April 1982). p. 270.

[107] Quoted in Clark, "Access," p. 1673.

[108] Fishel and Pottker, *Sex Discrimination*, p. 132.

[109] Marcus, *Promise and Performance*, p. 167.

[110] Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven: Yale University Press, 1977), p. 4.

[111] Breyer, *Regulation and Its Reform*, p. 118.

[112] Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Washington, DC: The Brookings Institution, 1977), pp. 5,8.

[113] Lester C. Thurow, *The Zero-Sum Society* (New York: Penguin Books, 1981), pp. 131-32.

[114] See "The 'Facts' About OSHA's 1,100 Revoked Regulations," *National Journal*, August 12, 1978, p. 1298 and Timothy B. Clark, "What's All the Uproar Over OSHA's 'Nit-picking' Rules," *National Journal*, October 7, 1978, pp. 1594-1596.

[115] See Charles R. Babcock, "Pesky School Dress Code Rule Lingers On," *The Washington Post*, June 1, 1982, p. A15 and "Dress Codes Decontrolled," *Regulation*, September/October 1982, pp. 12-13, 26.

[116] Califano, *Governing America*, p. 223.

[117] *Ibid.*, p. 225

[118] Eugene Bardach and Robert A. Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (Philadelphia, PA: Temple University Press, 1982), pp. 6-7.

[119] John Mendeloff, "Does Overregulation Cause Underregulation?: The Case of Toxic Substances," *Regulation*, September/October 1981, p. 47.

[120] *Ibid.*, p. 50.

[121] *Ibid.*, p. 49.

[122] *Ibid.*, p. 47.

[123] Malcolm Getz and Benjamin Walter, "Environmental Policy and Competitive Structure: Implications of the Hazardous Waste Management Program," *Policy Studies Journal* 9 (Winter 1980), p. 412.

[124] See Rochelle L. Stanfieid, "Are Federal Bilingual Rules A Foot in the Schoolhouse Door?", *National Journal*, October 18, 1980, pp. 1736-40.

[125] William G. Colman, "An Overview of the American Federal System: Entering an Era of Constraint," in *American Federalism in the 1980s: Changes and Consequences* (Cambridge, MA: Lincoln Institute of Land Policy, 1981), p. 15.

[126] "Bilingual Education: The New Accent in Civil Rights Regulation," *Regulation*, November/December 1980, p. 6; Abigail M. Thernstorm, "E Pluribus Plura—Congress and Bilingual Education," *The Public Interest* 60 (Summer 1980), pp. 4-5, 11-12.

[127] Tom Bethell, "Against Bilingual Education," *Harper's*, February 1979, p. 31.

[128] Thernstrom, "E Pluribus Plura," pp. 14-15.

[129] "Bilingual Education," p. 6.

[130] Stewart A. Baker, "The Deregulation That Wasn't," *The Washington Post*, July 19, 1981, p. C2.

[131] See “Education Groups Talk About the Bilingual Regulations,” *Education Times*, September 8, 1980, p. 2.

[132] Lucy Tirk, “Bilingual Education Rules Intrude on States' Rights” *State Government News*, October 1980, pp. 13-14.

[133] Andriana deKanter and Keith Baker, “Bilingual Education May Not Be Best Way to Educate Limited-English Children, Report Says,” *Education Times*, October 5, 1981, p. 2.

[134] Dan Baltz, “Bilingual Education Lives: Despite Outrage Over Dropping of Regulations, Programs Are Expected to Continue Expanding,” *Washington Post*, Feburary 7, 1981, p. A8; “Bilingual Education Lives,” *Regulation*, March/April 1981, p. 11.

[135] Baker, “The Deregulation That Wasn't,” p. C2.

[136] Elaine Yaffe, “Ambiguous Laws Fuel Debate on Bilingual Education,” *Phi Delta Kappan* 62 (June 1981), p. 741.

[137] Bardach and Kagan, *Regulatory Unreasonableness*, pp. 24-25.

[138] Jack L. Walker, “Setting the Agenda in the U.S. Senate: A Theory of Problem Selection,” *British Journal of Political Science* 7 (1977), pp. 423-25.

[139] Bardach and Kagan, *Regulatory Unreasonableness*, pp. 64-69.

[140] Schultze, *The Public Use of Private Interest*, pp. 56-57.

[141] Jerry L. Mashaw, “Regulation, Logic, and Ideology,” *Regulation*, November/December 1979, p. 47.

[142] Bardach and Kagan, *Regulatory Unreasonableness*, p. 20.

[143] *Ibid.*, p. 21.

[144] See Samuel Huntington, “The Marasmus of the ICC: The Commission, the Railroads and the Public Interest,” *Yale Law Journal* 61 (April 1952), p. 467-509.

[145] See Bardach and Kagan, *Going by the Book*, pp. 44-56.

[146] See chapter 3.

[147] Stone, *Regulation*, p. 186.

[148] See Advisory Commission on Intergovernmental Relations, *Protecting the Environment: Politics, Pollution, and Federal Policy*, A-83 (Washington, DC: U.S. Government Printing Office, 1981), pp. 18-25, 51-52.

[149] Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air* (New Haven: Yale University Press, 1981), p. 9.

[150] Marcus, *Promise and Performance*, p. 97.

[151] Harvey Lieber, *Federalism and Clean Waters* (Lexington, MA: D.C. Heath, 1975), p. 7.

[152] *Ibid.*, p. 193.

[153] Marcus, “Environmental Protection Agency,” p. 285.

[154] *Ibid.*, pp. 284-85.

[155] *American Textile Manufacturers Institute v. Donovan*, 49 LW 4720, June 16, 1981.

[156] Rabkin, “Office of Civil Rights,” p. 330.

[157] *Ibid.*, pp. 332-33.

[158] *Ibid.*, pp. 337-38.

[159] See Herbert Kaufman's discussion of “The Scapegoats” in *Red Tape*, pp. 23-28.

[160] Radin, *Implementation*, pp. 94-95.

[161] Yaffee, *Prohibitive Policy*, pp. 108-09.

[162] See Timothy B. Clark, “Here's One 'Midnight Regulation' That's Slipped through Reagan's Net,” *National Journal*, February 7, 1981, pp. 220-24 and “Building Access: Cost No Barrier?,” *Regulation*, September/October 1982, pp. 5-8.

[163] Wilson, *The Politics of Regulation*, p. 377.

[164] *Ibid.*, p. 378.

[165] Getz and Walter, “Environmental Policy,” p. 406.

[166] *Ibid.*, pp. 406-07.

[167] George J. Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2 (Spring 1971), pp. 3-20. For a critique, see Wilson, *The Politics of Regulation*, pp. 358-63.

[168] In the useful terminology suggested by James Q. Wilson, most of the traditional economic regulation offered concentrated benefits and dispersed costs. Much of the new social regulation, on the other hand, generates dispersed benefits and concentrated costs. See Wilson, *The Politics of Regulation*, pp. 366-72 and James Q. Wilson, “The Politics of Regulation,” in *Social Responsibility and the Business Predicament*, James W. McKie, ed., (Washington, DC: The Brookings Institution, 1974), pp. 135-68.

[169] Murray L. Weidenbaum, *Business, Government, and the Public* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1977), pp. 13-14.

[170] *Ibid.*, pp. 14-15.

[171] Charles F. Floyd, “Requiem for the Highway Beautification Act, *American Planners Journal* 48 (Autumn 1982), p. 441.

[172] See Paul H. Weaver, “Regulation, Social Policy, and Class Conflict,” *The Public Interest* 50 (Winter 1978), pp. 45-63.

[173] Mashaw, “Regulation,” p. 47.

[174] James Q. Wilson, *American Government: Institutions and Policies* (Lexington, MA: D.C. Heath And Company, 1980), p. 63.

[175] See Catherine H. Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), pp. 54-55.

[176] See Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977), pp. 4-9, and Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M-122 (Washington, DC: U.S. Government Printing Office, 1980).

[177] Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Papers*, Volume 1 (Washington, DC: U.S. Government Printing Office, 1980), p. A-7-1.

[178] Richard B. Cappalli, “Federal Grant Disputes: The Lawyer's Next Domain,” *The Urban Lawyer* 11 (Summer 1979), p. 387.

[179] David L. Kirp, “Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement, *Harvard Educational Review* 47 (May 1977), p. 118.

[180] Cappalli, “Federal Grant Disputes,” p. 388.

[181] George D. Brown, “The Courts and Grant Reform: A Time for Action,” *Intergovernmental Perspective* 7 (Fall 1981), p. 12.

[182] *Managing Federal Assistance*, p. A-2-29.

[183] Linda E. Demkovich, “The Clogged Federal Courts—Who Are the Culprits?,” *National Journal*, February 11, 1978, p. 226.

[184] Richard B. Cappalli, *Federal Grants and Cooperative Agreements: Law, Policy, and Practice*, Volume III (Wilmette, IL: Callaghan & Company, 1982), p. 22-4.

[185] See A. Myrick Freeman III, “Air and Water Pollution Policy,” in *Current Issues in U.S. Environmental Policy*, ed. Paul R. Portney (Baltimore, MD: John Hopkins University Press, 1978), p. 26.

[186] U.S. Congress, Senate, Committee on Environment and Public Works, *The Clean Air Act in the Courts*, A Report prepared by the American Law Division, Congressional Research Service, Library of Congress, Serial No. 97-2, 97th Cong., 1st sess., April 1981 (Washing-

ton, DC: U.S. Government Printing Office, 1981), pp. xii-xx.

[187] Kelman, "Occupational Safety and Health Administration," p. 259.

[188] Demkovich, "The Clogged Federal Courts," p. 225.

[189] Robert A. Katzmann, "Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy," *Yale Law Journal* 89 (January 1980), p. 513.

[190] Charles Fried, "Curbing the Judiciary," *The New York Times*, November 10, 1981, p. A23. For a further discussion, see *Chapter 2*.

[191] Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (June 1975), p. 1669. This article provides an excellent overview of both the history and current status of administrative law, and is relied upon heavily in the following discussion.

[192] A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

[193] Breyer, *Regulation*, p. 378.

[194] Stewart, "Reformation," pp. 1666-67.

[195] George C. Greanias and Duane Windsor, "Is Judicial Restraint Possible in an Administrative Society?", *Judicature* 44 (April 1981), p. 412.

[196] Richard B. Cappalli, *Rights and Remedies Under Federal Grants* (Washington, DC: Bureau of National Affairs, 1979), p. 57. In large part, the presumption that an agency's intrepretation of statutory requirements is the correct one rests upon a positive appraisal of agency expertise. This factor is given special weight if the issue at hand involves technical questions, has been long standing, or has been endorsed implicitly or explicitly by the failure of Congress to subsequently amend the provision under scrutiny. See David R. Woodward and Ronald M. Levin, "In Defense of Deference: Judicial Review of Agency Action," *Administrative Law Review* 31 (Summer 1979), pp. 332-35.

[197] See also Iris C. Rotberg, "Federal Policy in Bilingual Education," *American Education*, October 1982, pp. 30-40, reprinted from *Harvard Educational Review* 52 (May 1982).

[198] "Court Upholds Title IX Ban On Sex Bias in School Jobs," *Congressional Quarterly*, May 22, 1982, p. 1235.

[199] Cappalli, *Federal Grants*, pp. 21-32 to 21-44. See also "Title IX: Employment and Athletics Are Outside HEW's Jurisdiction," *Georgetown Law Journal* 65 (1976).

[200] Linda Greenhouse, 'Court Says School Anti-Bias Rules Cover Workers as Well as Pupils," *New York Times*, May 18, 1982, pp. A1, D23.

[201] Gene I. Maeroff, "College Challenges Federal Intervention," *New York Times*, April 10, 1979, p. C1.

[202] David Margolick, "Bias Rules Applied to Private School," *New York Times*, August 20, 1982, p. A17.

[203] Horowitz, *Courts and Social Policy*, p. 14.

[204] Quoted in Gary Bryner, "Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation," *Political Science Quarterly* 96 (Fall 1981), p. 414.

[205] *Ibid.*, p. 423.

[206] "Statement of Senator Bumpers in Support of S 1080" before the Subcommittee on Agency Administration, Senate Judiciary Committee, n.d., pp. 2-3.

[207] For an historical profile, see Cornelius B. Kennedy, "The Bumpers Amendment: Regulating the Regulators," *American Bar Association Journal* 67 (December 1981), pp. 1639-41.

[208] Elder Witt, "Funding Cutoff Allowed: Court Upholds Title IX Ban On Sex Bias in School Jobs," *Congressional Quarterly*, May 22, 1982, p. 1235.

[209] Bryner, "Courts, Congress, and Agencies," pp. 426-27.

[210] Frederick R. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (Baltimore, MD: Johns Hopkins University Press, 1973), pp. 16, 23, 289.

[211] Liroff, *A National Policy for the Environment*, p. 160.

[212] *Bucklein v. Volpe* (N.D. Cal. 1979) and *Texas Comm. on Natural Resources v. United States* (W.D. Tex. 1970), cited in Anderson, *NEPA in the Courts*, p. 15.

[213] *Ibid.*, pp. 17-20.

[214] *Environmental Defense Fund v. Ruckelshaus*, 439 F. 2d at 597, 1 ELR at 20064 (D.C. Cir. 1971).

[215] See Anderson, *NEPA in the Courts*, p. 20.

[216] Judge Wilkey in *Ethyl Corp v. EPA* (D.C. Cir., 1976), 8 *Environmental Reporter*—Cases 1785 at 1835, cited in R. Shep Melnick, "Judicial Capacity and Environmental Litigation: The Case of the Clean Air Act," paper prepared for the Annual Meeting of the American Political Science Association, August 31, 1980, p. 6.

[217] *Sierra Club v. Ruckelshaus* (D.D.C., 1972), 4 ERC 1205; *Fir v. Sierra Club* (U.S., 1973) 5 ERC 1417, cited in Melnick, "Judicial Capacity," p. 10.

[218] Melnick, "Judicial Capacity," p. 11.

[219] *Ibid.*

[220] Yaffee, *Prohibitive Policy*, pp. 146-47.

[221] See Rabkin, "Office of Civil Rights," pp. 348-49.

[222] Richard A. Liroff, "NEPA—Where Have We Been and Where are We Going?", *Journal of the American Planning Association* 46 (April 1980), p. 155.

[223] *Ibid.*, p. 157.

[224] Commission on Federal Paperwork, *Environmental Impact Statements* (Washington, DC: U.S. Government Printing Office, 1977); Comptroller General of the United States, *Environmental Assessment Efforts for Proposed Projects have been Ineffective* (Washington, DC: U.S. Government Printing Office, 1975); Council on Environmental Quality, *Environmental Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies* (Washington, DC: U.S. Government Printing Office, 1976).

[225] Patrick A. Parento, quoted in Lawrence Mosher, "In Purgatory," *National Journal*, December 18, 1982, p. 2173.

[226] Eugene Bardach and Lucian Pugliaresi, "The Environmental Impact Statement Process v. the Real World," *The Public Interest* 49 (Fall 1977), pp. 36-37.

[227] *Ibid.*, pp. 25-28.

[228] Melnick, "Judicial Capacity," pp. 21-22.

[229] Rabkin, "Office of Civil Rights," pp. 348-49.

[230] Bardach and Kagan, *Going by the Book*, p. 117.

[231] Remarks of George D. Brown, "Developments in Grant Law: Where Are the Courts Headed?", Meeting of the National Assistance Management Association, Washington, DC, December 8, 1982,

[232] Kirp, "Law, Politics," p. 119.

[233] Stewart, "Reformation," p. 1683.

[234] Fishel and Pottker, *National Politics*, pp. 148-49.

[235] *Ibid.*, p. 147.

[236] Yaffee, *Prohibitive Policy*, p. 146-47; Liroff, *National Policy*, pp. 186-87.

[237] Jeffrey M. Berry, *Lobbying for the People: The Political Behavior of Public Interest Groups* (Princeton, NJ: Princeton University Press, 1977), pp. 214, 225-26.

[238] Fishel and Pottker, *National Politics*, pp. 146-48.

[239] Kirp, "Law, Politics," p. 121.

[240] Stephen Vermeil, "Regulators Do Better Than Business in High Court Rulings This Term," *Wall Street Journal*, June 29, 1981, Section 2, p. 1. See Also "Supreme Court Upholds Regulatory Powers," *Congressional Quarterly*, June 20, 1981, pp. 1115-16.

[241] Thomas J. Madden, "Developments in Federal Grant Law, 1982," address to the National Assistance Management Association, Washington, DC, December 8, 1982, p. 3.

[242] See Thomas J. Flygare, "The Supreme Court Holds That Section 504 Does Not Require Affirmative Action," *Phi Delta Kappan*, September 1979, pp. 63-64 and "Court Ruling a Blow to Handicapped Rules," *National Journal*, June 16, 1979, pp. 1010, 1011.

[243] Cappalli, *Federal Grants*, p. 20:16.

[244] Connie Wright, "Appeals Court Sets Back Rules on Transit Access," *Nation's Cities Weekly*, June 1, 1981, pp. 1, 10.

[245] Rochelle L. Stanfield, "The Handicapped Want to Board the Bus, But Are They Being Taken for a Ride?", *National Journal*, March 13, 1982, pp. 449-50.

[246] Barbara J. Culliton, " 'Baby Doe' Regs Thrown Out by Court," *Science*, April 29, 1983, p. 480.

[247] See Charles R. Babcock, "Women's Athletics Aided by Philadelphia Ruling," *The Washington Post*, October 18, 1981, p. A10 and Robert Pear, "Court Interpretations Conflict on Scope of Sex Discrimination Law," *New York Times*, September 10, 1982, p. A17.

[248] Fred Barbash, "A-Plant Stress Order Overturned," *The Washington Post*, April 20, 1983, p. A1.

[249] Stewart, "The Reformation," p. 1810.

[250] "Enforcement May be Weakest Link in States," *Conservation Foundation Letter*, November 1980, p. 1.

[251] U.S. General Accounting Office, *Costly Wastewater Treatment Plants Fail to Perform as Expected* (Washington, DC: U.S. Government Printing Office, 1980) and U.S. General Accounting Office, *State's Compliance Lacking in Meeting Safe Drinking Water Standards* (Washington, DC: U.S. Government Printing Office, 1982).

[252] U.S. General Accounting Office, *Stronger Enforcement Needed Against Misuse of Pesticides* (Washington, DC: U.S. Government Printing Office, 1981).

[253] Robert M. Cohen, "Congress Likely to Ignore Reagan's Request for Clean Air Act Passage," *National Journal*, November 27, 1982, p. 2027.

[254] Larry E. Ruff, "Federal Environmental Regulation," in U.S. Congress, Senate, *Study on Federal Regulation: Appendix to Volume VI: Framework for Regulation*, 95th Cong., 2d Sess., December 1978, p. 283.

[255] U.S. General Accounting Office, *Cleaning Up the Environment: Progress Achieved But Major Unresolved Issues Remain* (Washington, DC: U.S. Government Printing Office, 1982), pp. ii, 17.

[256] *Ibid.*, p. 46.

[257] A report submitted to the U.S. Commission on Civil Rights by its Fifty-One State Advisory Committees, *The Unfinished Business: Twenty Years Later . . .* (Washington, DC: U.S. Government Printing Office, 1977), p. 4.

[258] U.S. General Accounting Office, "Unanswered Questions on Educating Handicapped Children in Local Public Schools" (Washington, DC: U.S. Government Printing Office, 1981), pp. 94-102.

[259] *Ibid.*, p. i.

[260] "Education System for Handicapped Hit by Advocates," *The Washington Post*, April 17, 1980, p. A-11.

[261] See Gary Orfield, "Why It Worked in Dixie: Southern School Desegregation and Its Implications for the North," in *Race and Schooling in the City*, Adam Yarmolinsky, Lance Liebman, and Corinne S. Schelling, eds., (Cambridge, MA: Harvard University Press, 1981), pp. 24-44.

[262] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974* (Washington, DC: U.S. Government Printing Office, 1975), pp. 756-57.

[263] U.S. General Accounting Office, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance With Title VI* (Washington, DC: U.S. Government Printing Office, 1980).

[264] Rabkin, "Office of Civil Rights," p. 305.

[265] Albert L. Nicholas and Richard Zeckhouser, "Government Comes to the Workplace: An Assessment of OSHA," *The Public Interest* 49 (Fall 1977), p. 53.

[266] Richard B. Cappalli, *Rights and Remedies Under Federal Grants* (Washington, DC: Bureau of National Affairs, 1979), pp. 65-66.

[267] Linda E. Demkovich, "The Clogged Federal Courts—Who Are the Culprits?", *National Journal*, February 11, 1978, pp. 222-26. See also Cappalli, *Rights and Remedies*, pp. 108-61.

[268] Peter H. Schuck, "Regulation: Asking the Right Questions," *National Journal*, April 28, 1979, p. 712.

[269] GAO, *Unanswered Questions*, pp. 8-28.

[270] U.S. General Accounting Office, *The Davis-Bacon Act Should be Repealed* (Washington, DC: U.S. Government Printing Office, 1979), p. 11.

[271] *Ibid.*, p. 12.

[272] See Office of Management and Budget, "Proposed Circular on Managing Generally Applicable Requirements for Assistance Programs," *Federal Register*, November 7, 1980, *Part VIII*, p. 74416.

[273] U.S. General Accounting Office, *Problems with Federal Equal Employment Opportunity Guidelines on Employee Selection Procedures Need to be Resolved* (Washington, DC: U.S. Government Printing Office, 1978), p. 10.

[274] Lorraine McDonnell and John Pincus, *Federal Aid to Education: An Intergovernmental Perspective* (Santa Monica, CA: Rand, 1977), pp. 18-19.

[275] GAO, *Cleaning Up the Environment*, p. 49.

[276] See Jackie Kimgrough and Paul T. Hill, *The Aggregate Effects of Federal Education Programs* (Santa Monica, CA: Rand, 1981).

[277] *Ibid.*, p. 43.

[278] Ruff, "Federal Environmental Regulation," p. 261.

[279] ACIR, *Protecting the Environment*, p. 52.

[280] Charles O. Jones, *Clean Air: The Policies and Politics of Pollution Control* (Pittsburgh, PA: University of Pittsburgh Press, 1975), pp. 211-275.

[281] GAO, *Costly Wastewater Treatment Plants*.

[282] Ronald J. Penoyer, *Directory of Federal Regulatory Agencies, 3rd ed.* (St. Louis, MO: Center for the Study of American Business, Washington University, 1981), p. 9.

[283] See, for example, U.S. General Accounting Office, *Health Systems Plans: A Poor Framework For Promoting Health Care Improvements* (Washington, DC: U.S. Government Printing Office, 1981), p. 18, and Fishel and Pottker, *National Politics and Sex Discrimination*, p. 131.

[284] U.S. General Accounting Office, *Hazardous Waste Management Programs Will Not Be Effective: Greater Efforts Are Needed* (Washington, DC: U.S. Government Printing Office, 1979), p. 11.

[285] Advisory Commission on Intergovernmental Relations, *An Agenda For American Federalism: Restoring Confidence and Competence*, A-86 (Washington, DC: U.S. Government Printing Office, 1981), p. 6.

[286] U.S. General Accounting Office, *Federal-State Environmental Programs—The State Perspective* (Washington, DC: U.S. Government Printing Office, 1980), pp. 56-80.

[287] GAO, *Unanswered Questions*, pp. 71-78.

[288] GAO, *State's Compliance Lacking.*

[289] ;U.S. General Accounting Office, *EPA Should Help Small Communities Cope With Federal Pollution Control Requirements* (Washington, DC: U.S. Government Printing Office, 1980), p. 18.

[290] U.S. General Accounting Office, *Issues Surrounding the Surface Mining and Control Act*, pp. 11-12.

[291] An earlier ACIR survey found that, of 264 Federal aid administrators responding, only 26% had actually withheld funds from a state or local government because of a lack of comliance with program requirements during the previous five years. See Advisory Commission on Intergovernmental Relations, *The Intergovernmental Grant System as Seen by Local, State, and Federal Officials*, A-54 (Washington, DC: U.S. Government Printing Office, 1977), p. 196.

[292] See Yaffee, *Prohibitive Policy*, pp. 5-7, 151-53.

[293] Fishel and Pottker, *Sex Discrimination*, p. 143.

[294] *Ibid.*, p. 144.

[295] OMB, *Managing Federal Assistance*, p. A-3-2.

[296] Cappalli, *Rights and Remedies*, p. 86.

[297] Robert D. Thomas, "Intergovernmental Coordination in the Implementation of National Air and Water Pollution Policies," in *Public Policy Making in a Federal System*, ed. Charles O. Jones and Robert D. Thomas (Beverly Hills, CA: Sage Publications, 1976), p. 131.

[298] Thompson, *Health Policy*, p. 241.

[299] Rabkin, "Office of Civil Rights," p. 342.+2

[300] U.S. General Accounting Office, *Speed Limit 55: Is It Achievable?* (Washington, DC: U.S. General Accounting Office, 1977).

[301] William J. Waters and John T. Tierney, "Health Planning: The Next Step," *New England Journal of Human Services* (Spring 1982), p. 40.

[302] See "Counties Threatened with Clean Air Sanctions," *County News*, February 14, 1983, and Cass Peterson, "Hill, EPA Fume Over Clean Air Act Rewrite," *The Washington Post*, November 8, 1982, p. A13.

[303] Philip Shabecoff, "E.P.A. Will Ease Sanctions On Clean Air Act Violators," *New York Times*, June 24, 1983, p. A10.

[304] Radin, *Implementation, Change*, p. 62.

[305] *Ibid.*, p. 15.

[306] Cappalli, *Federal Grants*, p 11-4.

[307] Lovell, *et al.*, *Federal and State Mandating*, p. 193.

[308] Capalli, *Federal Grants*, pp. 11-4, 11-9

[309] Colin S. Diver, "A Theory of Regulatory Enforcement," *Public Policy* 28 (Summer 1980), p. 297.

[310] Lave, *Social Regulation*, p. 3.

[311] Lovell, *et al.*, *Federal and State Mandating*, p. 186.

[312] Sarah F. Liebschutz, Irene Lurie, and Richard W. Small, "How State and Local Responses Confound Federal Policy," paper prepared for delivery at the 1983 Annual Meeting of the American Society for Public Administration, New York City, April 16-19, 1983, p. 22.

[313] For discussion of this point, see Paul T. Hill and Richard A. Rettig, *Mechanisms for the Implementation of Civil Rights Guarantees by Educational Institutions* (Santa Monica, CA: Rand, 1980) and Erwin C. Hargrove *et al.*, "School Systems and Regulatory Mandates: A Case Study of the Implementation of the Education for All Handicapped Children Act," Institute for Public Policy Studies, Vanderbilt University, August 1980.

Chapter 5

The Impact of Federal Intergovernmental Regulation on State and Local Governments: A Review of Current Research

Mandating has been little studied and only partially understood.[1]

The underlying premise of preceding chapters has been that intergovernmental regulation is having an increasingly important effect on the policy decisions and operations of state and local governments. This premise stems from the growing chorus of complaints about regulation by mayors, governors and county officials and from impressions built up piecemeal by a host of separate program evaluations. Unfortunately, the precise administrative, fiscal and political effects of federal regulations on state and local governments have been subject to surprisingly little systematic study. Only two comprehensive impact studies have been produced to date, although several less intensive surveys and reports on single jurisdictions have been performed.

These pioneering studies confirm impressions that intergovernmental regulations can impose substantial costs on subject jurisdictions. Furthermore, they have produced a more sophisticated understanding of mandate impacts and have identified issues deserving more research. The findings of these preliminary studies are reviewed in the course of this chapter, and a variety of generalizations and conclusions are distilled from them. In particular, available research indicates that:

- There are serious obstacles to accurately measuring the fiscal costs of federal mandates.
- The nonfiscal effects of regulation, including increased administrative inefficiency, reduced levels of government services, and the erosion of state and local government authority, may outweigh the fiscal costs of regulation, but these effects have not been fully catalogued and measured.
- Individual mandates can have widely varying effects on different jurisdictions.
- Although the most serious impacts result from the combined effects of multiple requirements, a handful of new regulations has been especially burdensome in recent years.
- Few efforts have been made to assess the benefits of regulations in a comprehensive manner.
- Local governments have found that state mandates as well as federal ones impose substantial costs.

Despite such findings, the limitations on current research are considerable. Existing studies utilize different definitions of what constitutes a federal "mandate" and they employ very different analytical techniques, so comparisons between the studies can be difficult. Many of the best reports focus exclusively on estimating the fiscal costs of intergovernmental regulation, devoting very little scrutiny to important nonfiscal effects. Moreover, most of the impact studies examine only local effects, devoting much less attention to the states. Such factors led the authors of one pioneering study to conclude that:

> The mandate subject is bigger and more complex than even we had thought before beginning this research. We commend the field to other researchers, both practitioners and theoreticians.[2]

Additional research surely is required, and the research limitations that gave rise to this call should be borne in mind as existing studies are reviewed.

THE RIVERSIDE STUDY

Probably the most ambitious and influential study about the impact of federal (and state) regulations on local government was performed by Professor Catherine Lovell and her colleagues at the University of California at Riverside.[3] This study was an exploratory effort to define and survey the universe of federal and state mandates in order to lay the groundwork for future research. As might be expected with a preliminary venture, questions have since been raised about various aspects of the study, including its definition of "mandate," its enumeration of mandates, and its methodology for calculating their expense. Nevertheless, its findings have been widely cited in the intergovernmental and regulatory literature, and its conceptualization of mandate characteristics has greatly influenced subsequent research.

Scope and Methodology of the Report

The Riverside study sought to achieve seven ambitious goals in the course of its research:

- to construct a workable definition of mandates;
- to develop a classification of mandate types;
- to develop an inventory of federal and state mandates applicable to general purpose local governments;
- to examine the fiscal impacts of federal and state mandates in ten local governments;
- to develop a research model for assessing mandate impacts;
- to explore options for mitigating mandate impacts on local governments; and
- to expand knowledge about the mandate issue.

In order to assess the total regulatory burden on local governments and to permit comparisons, both state and federal mandates were investigated. A list of federal mandates was developed through a search of the *Code of Federal Regulations*. State mandates were catalogued in five different states—California, North Carolina, New Jersey, Wisconsin and Washington—using a variety of state sources.

One city and one county were selected in each of the five to study the local impacts of these mandates.[4] Field associates were sent to each jurisdiction to examine government records and to interview officials about the effects of a selected number of mandates. The research focused almost wholly on fiscal impacts, although it also acknowledged the importance of political and institutional impacts.

Mandate Definition and Typology

The Riverside study adopted a sweeping definition of intergovernmental regulation in carrying out its research. A mandate was defined as "any responsibility, action, procedure or anything else that is imposed by constitutional, legislative, administrative, executive or judicial action as a direct order or that is required as a condition of aid."[5] By considering any condition of aid a mandate, this definition required a count of all program requirements associated with every federal-local grant. It thus differed from the definition employed by the ACIR in this volume, which focuses on newer, more coercive forms of intergovernmental regulation. Using the broader definition, Lovell and associates identified 1,259 federal mandates,[6] although any particular jurisdiction was affected by only a portion of this number.[7] Of this total, 223 mandates were found to be direct orders and 1,036 mandates were conditions of aid.

Unfortunately, the study provided no listing of these mandates nor any specific examples of each kind. This makes it difficult to ascertain or evaluate the method used for translating the substance of federal regulations into numbers of mandates.[8] However, an independent review of some of the raw data compiled for the study raises unsettling questions about the validity of the mandate inventory. For example, the relatively streamlined Community Development Block Grant Program was considered to entail 32 separate mandates, while the highly complex *Clean Air Act* was said to comprise only nine. Curiously, General Revenue Sharing was coded as promulgating five separate *direct order* mandates. Crosscutting requirements like Title VI of the *Civil Rights Act* and environmental impact statements appear to be counted separately each time they are mentioned in the regulations of individual programs. In fact, Title VI is counted once as a general requirement applying to all HEW assistance programs and again as a requirement of specific public health programs. Such irregularities suggest that the authors' caveats concerning usage of the mandate inventory are well advised and should be considered during all subsequent analyses based upon this data.

Although there are problems concerning its estimation of the number of federal requirements, the Riverside study did develop the most sophisticated conceptualization of mandate types found in the impact literature. This typology is reproduced in *Table 5–1*. Most federal mandates were found to be procedural rather than programmatic in character. That is, they pertain to reporting, accounting, and performance procedures rather than a requirement that a certain activity or program be established. Seventy-six percent of them were vertical in application—directed at "only one function, department or program."[9] The remaining 24% of federal mandates were classified as horizontal, which apply across-the-board. Although smaller, this latter category was found to have grown most rapidly in recent years. In terms of origin, 96% of federal mandates were deemed to derive from regulation while 3% stemmed directly from statute. Eighty-two percent were classified as conditions of aid compared with 18% direct orders. Approximately 75% of the conditions of aid were promulgated by only three federal entities: HEW, HUD, and EPA. Many direct orders, however, were traced to independent agencies.

On some of these dimensions, federal regulations appeared to differ sharply from patterns found among state mandates. Such differences may have been illusory to some extent, reflecting variations in the sources used for compiling state and federal regulations. Assuming this was not the case, however, only a fraction of federal mandates was found to emanate directly from statutes, while 80% of state mandates were statutorily derived. Moreover, 95% of state mandates were classified as direct orders, compared with less than a fifth of federal ones. In addition, the states examined in the study had an average of 683 mandates, or approximately half the calculated number of federal ones. However, the states varied widely in their numbers of mandates, ranging from a high of 1,479 in California to a low of 259 in North Carolina.[10] (See *Table 5–2.*)

The numbers of both federal and state man-

Table 5–1

Distribution of Federal and State Mandates, by Type, Application, Origin, Vehicle and Function

	Federal		State	
	Percent	Number	Percent	Number
TYPE				
Program	9.9	125	5.4	183
Quality	5.6	71	4.0	137
Quantity	1.0	12	1.1	36
Procedural				
Reporting	12.5	158	15.8	539
Performance	36.7	463	36.7	1322
Fiscal	12.5	147	11.6	397
Personnel	9.5	120	8.6	297
Planning and Evaluation	6.1	77	2.6	90
Recordkeeping	4.5	57	3.5	118
Constraint				
Base	0.3	1	3.0	101
Rate	0.1	1	4.0	138
Expenditure Caps	1.0	13	1.5	52
TOTAL	100.0	1255[1]	100.0	3415
METHOD OF APPLICATION				
Vertical	76.3	961	91.2	3114
Horizontal	23.7	299	8.8	300
TOTAL	100.0	1260	100.0	3414
ORIGIN				
Law	3.3	41	80.0	2739
Executive Order	1.1	14	0.1	4
Administrative Regulation	95.6	1205	18.8	641
TOTAL	100.0	1259	98.9	3415
VEHICLE OF APPLICATION				
Direct Orders	18.0	223	95.7	3268
Conditions of Aid	82.0	1036	4.3	147
TOTAL	100.0	1259	100.0	3415

Table 5–1 (continued)

Distribution of Federal and State Mandates, by Type, Application, Origin, Vehicle and Function

	Federal		State	
	Percent	Number	Percent	Number
FUNCTION				
Agriculture	0.1	1	2.7	92
Community Development	28.2	355	10.9	373
Community Sciences	3.6	45	1.2	42
Education	6.3	80	4.8	165
Environment	7.9	100	5.8	198
General Government	16.2	204	34.4	1176
Health	26.2	330	12.3	419
Public Assistance	1.4	18	3.1	107
Public Protection	2.6	33	11.2	383
Recreation/Culture	0.6	17	1.8	60
Transportation	3.0	38	4.6	157
General Regulation	3.9	13	7.1	243
TOTAL	100.0	1234[1]	100.0	3415

[1] These totals were incorrectly listed as 1280 in the Riverside report.

SOURCE: Catherine H. Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), p. 2.

Table 5–2

Federal and State Mandates, by Conditions of Aid, Direct Orders and Applicability

Jurisdiction	FEDERAL				STATE			
	Conditions of Aid		Direct Orders		Conditions of Aid		Direct Orders	
	Applicable	Non-applicable	Applicable	Non-applicable	Applicable	Non-applicable	Applicable	Non-applicable
Cities								
Milwaukee, WI	498	536	115	100	20	0	574	58
Winston-Salem, NC	527	507	173	42	10	0	223	26
Olympia, WA	254	780	93	122	63	14	340	68
Trenton, NJ	562	472	32	183	7	0	499	25
San Bernardino, CA	601	433	133	82	7	17	528	923
Counties								
Dane County, WI	565	469	126	89	15	5	491	141
Guilford County, NC	455	579	133	82	10	0	174	75
Thurston County, WA	217	817	55	160	66	11	337	71
Somerset County, NJ	414	620	26	189	7	0	515	9
Orange County, CA	647	387	88	127	18	6	1151	300

SOURCE: Catherine H. Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), p. 82.

dates have grown rapidly in recent years. The growth rate of federal regulation increased markedly after 1960, with the period of fastest growth occurring between 1971 and 1975.[11] Since that time, the rate of increase showed signs of slackening, although total numbers continued to grow.

Analysis of Fiscal Impacts

The core of the Riverside study was devoted to attempts at comprehensively assessing the fiscal impacts of state and federal mandates on local governments. A great deal of empirical research and conceptual theorizing was devoted to this end. Nevertheless, the authors stressed that their research was limited and tentative and that their findings were not "definitive."[12]

According to the authors, the most serious problems encountered in the study concerned difficulties in measuring actual mandate costs. They observed that "there is a wide gap between ... data needs ... and data availability."[13] For example, ten different categories of direct and indirect program costs affecting local government were identified, but many of these could be estimated only roughly.[14] The study did make progress in conceptualizing the real costs of mandates, but this tended to complicate the task of measurement even further. For example, the study distinguished between true mandate costs and actual expenditures on mandated activities. Frequently, portions of a mandated activity were already being performed by a jurisdiction prior to the imposition of the mandate. Thus, it was reasoned that such "prior costs" should not be attributed to the mandate. Even if prior costs are subtracted, however, a jurisdiction might have moved to perform certain mandated activities independently, whether the regulation had been imposed or not. Therefore, true mandate costs should be equal only to the difference between current expenditures on mandated activities and the abstract or "preferred" level of spending on those activities, which would occur in the absence of any mandates. This, of course, is highly subjective. Moreover, the full costs of any mandate are registered only when there is full compliance. If this is lacking, then full compliance costs—beyond any existing expenditures—must be estimated along with preferred costs.

In response to these serious difficulties, the Riverside study undertook substantial efforts to simplify the task of assessing mandate costs. Field researchers in the ten jurisdictions did not attempt to produce a measure of all mandate costs for each government. Instead, they focused on only a selection of mandates in each jurisdiction, ranging from 38 mandates in Somerset County, NJ, to 225 in Milwaukee, WI.[15] Moreover, different mandates were examined in each jurisdiction. Some researchers focused on the most expensive requirements while others chose a broad variety of them. Similarly, an economic model for analyzing mandate impacts developed in Chapter 4 of the study subsumes only direct orders rather than the full range of mandates.

Given all of these limitations, no dollar estimates of mandate costs were presented in the study. The researchers reported being "uncomfortable about their accuracy."[16] However, a variety of other fiscal impact data was presented.

MANDATE EXPENDITURES

Among jurisdictions, mandates were judged to impose widely differing costs. Estimates of combined state and federal mandate costs ranged from 10% of total local expenditures in one jurisdiction to 85% of local expenditures in another.[17] State mandates were found to require at least some local funding in a greater percentage of cases than did federal mandates, but the authors warned that comparisons between state and federal mandates should be made cautiously.

Surprisingly, local governments were judged to pay a portion of mandated costs more frequently for federal conditions of aid than for federal direct order mandates, although this pattern varied among assisted functional areas. (See *Table 5-3*.) There were also differences reported between counties and cities, with cities reporting payment of mandate costs in a larger percentage of cases. In making these payments, local governments relied almost totally on general funds. In particular, general funds were used exclusively to pay for federal horizontal mandates of all varieties (See *Table 5-4*).

Table 5-3

Funding Sources for Mandates—All Jurisdictions Combined
(in percent)

QUESTION: WHAT ARE THE SOURCES OF FUNDING FOR THE MANDATE?

	Local			Intergovernmental			
	General Fund*	Special Fund*	User Fee*	Federal Funds*	State Funds*	Other*	Number of Responses
FEDERAL							
Direct Orders	30%	9%	5%	47%	5%	4%	75
Conditions of Aid	45	1	0	49	4	1	191
STATE							
Direct Orders	74	5	7	5	7	2	451
Conditions of Aid	43	0	14	7	21	14	14
TOTAL	61	4	5	21	6	2	731

*Entries represent percentage response frequencies for each category of funding. If a mandate was funded from more than one source, each source is counted as a separate response.

SOURCE: Catherine H. Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), p. 162.

PRIOR COSTS

The Riverside authors emphasized that the preceding mandate expenditure data can only be interpreted properly in light of the level of mandated activity a jurisdiction would voluntarily perform and its degree of regulatory compliance. They found that, prior to the imposition of federal mandates, the jurisdictions studied were not performing the mandated activity at all in slightly over one-half of the cases. In over one-third of the cases, local governments reported performing the mandate fully before its imposition, and in the remaining cases there was partial fulfillment.[18] Program mandate activities were much more likely to have been performed prior to imposition of the federal regulations than procedural ones. However, patterns of prior activity varied greatly among different jurisdictions and between functional areas.

PREFERRED COSTS

Since many mandates were not performed fully in earlier years, it is not surprising that local governments reported that they would spend less on many mandated activities if the mandate were eliminated. Respondents indicated they would spend less on 68% of the federal direct order mandates and on 34% of the federal conditions of aid.[19] In both cases the number of respondents willing to spend more was virtually nil. Again, these findings varied somewhat among different types of mandates and among functional areas. In particular, federal horizontal mandates were deemed to be the least popular variety.

COMPLIANCE

The authors found the degree of compliance with federal mandates to be "substantial but far from complete."[20] Adherence to federal direct orders was judged to be the most complete, with full compliance found in 64% of these mandates.[21] Federal conditions of aid, on the other hand, had a poorer record of full compliance than any other state or federal mandate type. In nearly one-fifth of these cases, nonadherence was reported. However, full or substantial adherence was reported in

Table 5–4

Funding Sources for the various Mandate Types (in percent)

QUESTION: WHAT ARE THE SOURCES OF FUNDING FOR THE MANDATE?

	Local			Intergovernmental			
Mandate Type	**General Fund***	**Special Fund***	**User Fee***	**Federal Funds***	**State Funds***	**Other***	**Number of Responses**
FEDERAL DIRECT ORDERS							
Vertical Program	42%	17%	0%	8%	33%	0%	12
Vertical Procedural	44	19	7	23	7	0	43
All Vertical	44	18	5	20	13	0	55
Horizontal Program	100	0	0	0	0	0	3
Horizontal Procedural	100	0	0	0	0	0	8
All Horizontal	100	0	0	0	0	0	11
All Program	53	13	0	7	26	0	15
All Procedural	53	17	6	20	8	0	51
All Types	53	15	5	17	10	0	66
FEDERAL CONDITIONS OF AID							
Vertical Program	85	0	0	15	0	0	13
Vertical Quantity & Quality	50	0	25	25	0	0	4
Verticap Procedural	47	4	1	37	11	0	170
All Vertical	50	3	1	35	10	0	187
Horizontal Program	100	0	0	0	0	0	9
Horizontal Procedural	100	0	0	0	0	0	15
All Horizontal	100	0	0	0	0	0	24
All Program	91	0	0	9	0	0	22
All Procedural	52	3	0.5	34	10	0	185
All Types	56	3	1	31	9	0	211
STATE DIRECT ORDERS							
Vertical Program	56	17	28	0	0	0	18
Vertical Quantity & Quality	86	0	14	0	0	0	7
Vertical Procedural	79	4	5	7	5	0	329
All Vertical	78	5	6	6	5	0	354
Horizontal Program	61	6	24	6	3	0	33
Horizontal Procedural	74	5	5	10	5	0	19
All Horizontal	65	6	17	7	4	0	52
All Program	59	10	25	4	2	0	51
All Procedural	79	4	5	7	5	0	348
All Types	77	5	8	7	4	0	406
STATE CONDITIONS OF AID							
Vertical Program	50	0	50	0	0	0	2
Vertical Quantity & Quality	50	0	50	0	0	0	2
Vertical Procedural	60	27	0	7	7	0	15
All Vertical	58	21	10	5	5	0	19
All Program	50	0	50	0	0	0	2
All Procedural	60	27	0	7	7	0	15
All Types	58	21	11	5	5	0	19
TOTAL							
Vertical Program	60	11	13	7	9	0	45
Vertical Quantity & Quality	70	0	23	7	0	0	13
Vertical Procedural	68	6	4	17	7	0	557
Horizontal Program	71	4	18	4	2	0	45
Horizontal Procedural	88	2	2	5	2	0	42
All Horizontal	79	3	10	4	2	0	87
All Program	65	8	16	6	6	0	90
All Procedural	68	5	4	17	7	0	599
All Types	68	6	5	15	6	0	702

*Entries represent percentage response frequencies. If a mandate was funded from more than one source, each source is counted as a separate response.

SOURCE: Catherine H. Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), p. 167.

Table 5–5

Degree of Compliance with Mandates—All Jurisdictions Combined (in percent)

QUESTION: HOW WELL IS THE MANDATE BEING PERFORMED?

	Not at all*	Minimally*	Substantially*	Completely*	Number of Responses
FEDERAL					
Direct Orders	4%	5%	26%	64%	65
Conditions of Aid	18	6	41	33	221
STATE					
Direct Orders	7	2	32	59	471
Conditions of Aid	8	4	32	56	25
TOTAL	10	4	30	56	781

*Entries represent percentage response frequencies.

SOURCE: Catherine H. Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), p. 188.

most of the remaining cases. (See *Table 5-5.*) Among jurisidctions, cities were judged to have better records of compliance with federal mandates than counties, but again, compliance levels varied substantially between functional areas.

Conclusions

The authors of the Riverside study concluded that:

> There are significant fiscal impacts of mandates on local governments, and ... these impacts have political and institutional as well as fiscal importance.[22]

Unfortunately, they devoted little attention to such political and institutional consequences of intergovernmental regulation. Even a basic inventory of important nonfiscal regulatory impacts was omitted from this report. Concerning the fiscal effects of mandates, however, the authors emphasized several findings, including:

- the relatively greater impact of mandates on cities than on counties;
- the significance of the impact of horizontal mandates in comparison with more traditional vertical mandates;
- the differential impact of state and federal mandates;
- there are substantial differences in mandate impacts among the various functional areas;
- mandates have added to the cost of local government and have altered, substantially, the activities of local governments.[23]

In closing, they recommended the development of a mandate monitoring mechanism that local governments can adopt to track the costs of new mandates imposed on them.

THE URBAN INSTITUTE STUDY

A second influential study of the impact of federal mandates on local governments has been prepared by Thomas Muller and Michael Fix of the Urban Institute. Their work on "The Impact of Selected Federal Actions on Municipal Outlays" was developed as part of a broad study of economic change and federal regulation conducted by the Joint Economic Committee of Congress.[24]

The Urban Institute (UI) study had certain features in common with the work conducted by Professor Lovell and her colleagues at the University of California. Both studies focused almost entirely on the *fiscal* impacts of federal mandates, examining these effects across a range of different local jurisdictions. On the other hand, the UI study was less ambitious than the Riverside study, particularly in terms of conceptual orientation. Rather than attempting to define and inventory the entire range of state and local mandates, it looked only at a handful of federal intergovernmental regulations in a few communities. Having selected a much narrower piece of the regulatory terrain, the UI study attempted to assign actual dollar costs to federal mandates rather than indicate only general and relative fiscal effects.

Scope and Methodology

Despite its attempts to distill concrete cost estimates for federal mandates, the Urban Institute study is most appropriately viewed as an exploratory or illustrative investigation of fiscal impacts. In the authors' words:

> The report should not be considered a definitive examination of a very complex issue, but rather an initial step which provides insight into the magnitude of the problem.[25]

This admonition stemmed from several major limitations on the scope and methodology of the study.

To begin with, only six federal "mandates" were examined in the body of the study, although a few program specific conditions were discussed near the end of the report. These six were the *Davis-Bacon Act*, the *Clean Water Act*, the *Education for All Handicapped Children Act*, the *Bilingual Education Act*, the 1976 amendments to the *Unemployment Compensation Act of 1974*, and the requirements of Section 504 of the *Rehabilitation Act of 1973* pertaining to transportation systems. These six were chosen because they had been identified by local officials as notably expensive or intrusive.[26] In addition, the authors selected these programs in the belief that local costs attributable solely to federal actions would be relatively easy to measure in these instances.[27] In contrast, federal intergovernmental regulations that were not considered highly expensive were excluded from examination. Certain other federal requirements generally deemed expensive or intrusive, such as the *Clean Air Act* and OSHA, were also excluded from the study because of difficulties in measuring the costs imposed. In fact, the authors discovered in the course of their research that the costs imposed by the *Davis-Bacon Act* were very difficult to ascertain, so this program was not included in the study's fiscal data. Apart from these criteria, little attempt was made in this report to conceptualize or carefully define the universe of federal mandates.

Like its sample of regulations, the sample of jurisdictions studied in the UI report was limited. Regulatory impacts were examined in six municipalities: Burlington, VT; Alexandria, VA; Cincinnati, OH; Dallas, TX; Seattle, WA; and Newark, NJ. One county—Fairfax, VA—was also included in the sample. In selecting these seven jurisdictions, the authors sought to ensure some variation among them in terms of population size, regional location, tax rates, and per capita income. Nevertheless, the sample was not a fully representative one. The average size of the jurisdictions selected was 394,000 inhabitants. Only one, Burlington, VT, fell below 100,000 in population. Partly because these were large and medium size communities, they received above average levels of federal assistance compared with American cities as a whole. Hence, they probably experienced a greater incidence of regulatory impacts than the average American city. As the authors admitted, "caution needs to be exercised in relating results from the selected jurisdictions to others in the nation."[28]

A third limitation associated with the findings of the UI study stems from difficulties inherent in the task of measuring costs associated with federal regulations. Certain problems exist regardless of the number of programs or jurisdictions examined. Mandate costs are appropriately defined as incremental expenses, above and beyond what a city would spend on an activity in the absence of a federal requirement. Such incremental costs can only be approximated, although the UI researchers employed a variety of methods to estimate them. City records and documents were examined. City officials were interviewed in person and by telephone to discuss their expenditures on the activities in question and to estimate what might be spent independently of federal requirements. The authors also sought to supplement government officials' subjective evaluations of "preferred costs" with trend data on expenditures in order to compare expenses before and after the imposition of a mandate. Thus, while they were cognizant of the difficulties involved in accurately measuring incremental regulatory costs, the authors argued that the expenditure figures produced in their study were conservative estimates of total mandate costs.[29] In particular, they attempted to measure only direct costs and excluded indirect costs like overhead and administration, reporting and data collection costs, etc.[30] By the same token, however, no attempt was made to estimate the benefits that might be associated with federal mandates.

Findings

With these caveats in mind, the UI study reported three major sets of findings and a number of lesser ones. The most significant finding was that federal requirements impose "substantial" costs on local governments.[31] The authors estimated that the requirements studied imposed an average of $25 per capita in 1978 on the jurisdictions studied.[32] This, they observed, was roughly comparable to the amount of funds received by these jurisdictions under General Revenue Sharing.[33] Comparing these mandate costs to the amount of federal aid received by these communities as a whole, the authors estimated that the local costs of these federal requirements amounted to approximately 19% of the total federal aid received.[34]

As one might expect, this overall cost was not attributable evenly to each mandate. A second important finding was that different federal mandates impose very different costs on recipient jurisdictions. Overall, the *Clean Water Act* was by far the most expensive. In 1978, it imposed an estimated total of $27.5 million in annual operating costs on the seven jurisdictions studied, plus annual capital expenditures of $8.3 million.[35] (See *Table 5–6*.) The second most expensive program was found to be the *Education for all Handicapped Children Act* (PL 94–142). This imposed an estimated $19.2 million in operating and construction costs on the jurisdictions examined. In some communities, such as Burlington, VT, and Fairfax County, VA, the costs attributable to this requirement were even judged to outweigh the fiscal impact of the *Clean Water Act*. The least expensive mandate included in this study was the application of unemployment compensation requirements to local communities. This was estimated to cost the seven jurisdictions studied a total of $927,000 in 1978.

Not only do different federal regulations

Table 5–6

Local Annual Costs of Meeting Selected Mandates (in millions)

	Clean Water Act	Education of Handicapped	Unemployment Compensation	Access for Handicapped	Bilingual Education	Total
Operating Costs	$27.5	18.7	0.9	0.5	4.1	51.7
Capital Costs	$ 8.3	0.5	0.0	1.1	0.0	9.9
Total Costs	$35.8	19.2	0.9	1.6	4.1	61.6

SOURCE: Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," *Government Regulation: Achieving Social and Economic Balance*, Volume 5 of *Special Study on Economic Change*, U.S. Congress, Joint Economic Committee (Washington, DC: U.S. Government Printing Office, 1980), p. 368.

Table 5–7

Annual Cost of Mandates in Selected Jurisdictions (per capita)

	Alexandria	Burlington	Cincinnati	Dallas	Fairfax County	Newark	Seattle
Clean Water Act:							
Operating	[1]$14.81	0	$12.20	$4.83	$7.72	$31.42	$4.68
Capital[1]	5.47	0	2.95	1.26	4.95	5.44	2.16
Educating handicapped:							
Operating	9.26	1.67	0	1.92	22.58	6.32	3.67
Capital[1]	.02	1.56	0	.27	2.24	.43	.04
Access for handicapped:							
Operating	[2]NA	1.10	.91	0	[2]NA	[2]NA	.31
Capital[1]	.95	0	1.41	.03	[1].27	.77	.02
Bilingual education:							
Operating	0	0	0	.46	1.07	6.95	2.05
Capital							
Unemployment compensation:							
Operating	.90	.90	.85	.05	.23	.18	.46
Capital							
Davis-Bacon Act	[3]Yes	.77	0	[3]Yes	[3,4]Yes	0	0
Total:							
Operating	31.41	6.00	18.32	8.79	39.06	51.51	13.39
Capital							

[1] Cumulative capital outlays amortized over 20 years based on 6% rate of borrowing to facilitate comparisons among jurisdictions.

[2] Not available.

[3] The *Davis-Bacon Act* has created an effect in this jurisdiction but the effect could not be quantified.

[4] None in 1978 except for Metro.

SOURCE: Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," *Government Regulation: Achieving Social and Economic Balance*, Volume 5 of *Special Study on Economic Change*, U.S. Congress, Joint Economic Committee (Washington, DC: U.S. Government Printing Office, 1980), p. 368.

impose distinctive average costs on local governments, but their individual and cumulative effects vary enormously from one jurisdiction to another. This third important finding is made abundantly evident in *Table 5–7*. As measured in this study, the total fiscal effect of federal mandates varied from an estimated cost of $51.50 per capita in Newark, NJ, to a low of $6.00 per capita in Burlington, VT. To help place these figures in some perspective, *Table 5–8* shows local regulatory costs as a percentage of federal aid received by each jurisdiction. Although the relative rankings of jurisdictions vary somewhat between *Tables 5–7 and 5–8*, this reflects differing levels of federal aid received by various communities.

The extraordinary geographic range of fiscal effects is duplicated when individual mandates are considered separately. The *Clean Water Act*, for example, imposed substantial costs in 1978 on Alexandria, Cincinnati, and Newark, but it had no fiscal effect on Burlington because that city had constructed advanced waste water treatment facilities before the federal requirement was even imposed. The *Education for All Handicapped Children Act* had significant effects on Alexandria and Fairfax County because of prior state policy concerning spe-

Table 5–8

Federal Mandates as a Percentage of Total Federal Aid Received by Separate Jurisdictions*

	Mean	Alexandria	Burlington	Cincinnati	Dallas	Fairfax	Newark	Seattle
Mandate Cost as a Percent of Federal aid	18.9%	11.3%	9.0%	8.8%	15.4%	46.0%	32.2%	15.2%

*Based on assumption that all local capital outlays are met by long-term debt. Because of difficulties in obtaining federal aid and mandate data for the same years, percentages are only approximate.

SOURCE: Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," *Government Regulation: Achieving Social and Economic Balance*, Volume 5 of *Special Study on Economic Change*, U.S. Congress, Joint Economic Committee (Washington, DC: U.S. Government Printing Office, 1980), p. 366.

cial education in Virginia. Cincinnati was little affected, however, because it already was active in this field. In fact, the federal requirement was judged to have "impeded local spending" on educational construction projects for the handicapped in Cincinnati.[36]

CAUSES OF DIFFERENTIAL IMPACTS

Altogether, four explanations were developed in the UI study to explain the differential impacts of federal requirements on various communities. Prior activity was one important factor. Frequently, jurisdictions which are already actively engaged in providing mandated services will be less affected by federal prescriptions. The examples of Burlington and Cincinnati already cited illustrate this point. Such local activism may also be the product of pre-existing state mandates or financial assistance.

Other factors that contribute to variations in the magnitude of mandate impacts include local demographic characteristics. Substantial differences in the ethnic composition of student populations in Cincinnati, Dallas and Newark helped explain the diversity of costs incurred for bilingual education. A community's fiscal health was yet another differentiating factor discovered in the study. Hard-pressed cities may be forced to lay off workers, which results in added unemployment compensation costs. A final factor affecting mandated costs identified by Muller and Fix was compliance. At least in the short term, the degree to which a jurisdiction complies with federal requirements may substantially affect its fiscal burden. According to the authors:

> A city can usually postpone, with relative impunity, the implementation of a mandate by relying upon a number of delaying tactics, including costly legal challenges.[37]

Other Findings

Despite this last observation, Muller and Fix concluded that compliance rather than noncompliance was the general rule in the communities they examined. They noted that "in most cases . . . local governments appear to cooperate closely with federal agencies."[38] Although the focus of their study was on fiscal impacts of federal intergovernmental regulation, the authors also touched on several nonfiscal impacts in the course of their report. In the case of Fairfax County's experience with bilingual education regulations, for example, local opposition to the federal mandate appeared to have been prompted as much by resentment over federal interference with locally preferred educational methods as by the regulatory costs imposed. Bilingual education regulations required Fairfax to instruct non-English speaking students in their native language until they attained a level of fluency in English. Because it contained many groups of foreign students, often with obscure languages, Fairfax preferred to continue using its established

"English as a second language" approach instead.

Conclusion

Given the difficulties inherent in distilling valid estimates of the costs of federal regulations, even on a modest scale, the Urban Institute's researchers advised that the mandate cost estimates developed in their study should be viewed as illustrative but not precise.[39] Nonetheless, the study found that federal regulations can impose "substantial" costs on local jurisdictions. In addition, the demonstration that mandate impacts vary widely is a valuable, if not unexpected, finding that should be recognized in all serious discussions of the topic.

ADDITIONAL DATA COMPARING REGULATORY EFFECTS IN MULTIPLE JURISDICTIONS

The Urban Institute and Riverside studies constitute the most intensive efforts to assess the fiscal effects of federal regulations over a range of local jurisdictions. Many of the remaining studies have examined mandate impacts on individual communities and these will be reviewed shortly. Given the great variations in impacts found in the UI study, however, these independent analyses may have only limited relevance to the nation as a whole.

This gap has been partially filled by several additional sources on regulatory effects in multiple jurisdictions. Between 1975 and 1977, the Commission on Federal Paperwork attempted to ascertain the fiscal and administrative costs imposed on state and local governments by federal red tape. Two years later, the General Accounting Office conducted a brief investigation of the impact of several crosscutting federal requirements on a few different communities. The most current information on the effects of federal mandates can be gleaned from recent membership surveys conducted by the National Association of Counties (NACo) and the National League of Cities (NLC). These organizations sampled their members' views on a limited number of federal requirements during the course of developing recommendations for the federal Task Force on Regulatory Relief, chaired by Vice President George Bush. Although neither of the local government surveys attempted to describe the effects of mandates in detail, they did provide a useful indicator of the range of local government objections to federal regulations.

Reports of the Commission on Federal Paperwork

In the mid 1970s, the Commission on Federal Paperwork undertook a major evaluation of the burdens imposed by federal administrative requirements. Although the Commission concentrated much of its effort on paperwork requirements in the private sector, several of its 36 volumes addressed important aspects of federal regulation of state and local governments. One study attempted to assess the administrative costs associated with selected regulations in a sample of subnational jurisdictions. Other reports examined individual mandates in specific functional fields.

PAPERWORK IMPACT ANALYSIS

The principal volume concerning the effects of federal paperwork on state and local governments was performed on behalf of the Paperwork Commission by the Academy for Contemporary Problems.[40] This study attempted to measure the "noncore" costs of federal paperwork at both the state and local levels of government—that is, those expenses above and beyond the level a jurisdiction would incur if performing a task in the absence of federal requirements. Whenever possible, desk audits were used in an attempt to measure the time actually spent by employees in fulfilling paperwork requirements.

The Commission-Academy study estimated that the paperwork costs associated with federal programs ranged from 1% to 10% of grant program outlays.[41] In dollar terms, the estimated costs of paperwork were placed at $2 to $5 billion annually, not including costs passed on by state and local governments to other persons and entities.[42] However, paperwork costs were found to vary considerably from program to program.[43] In particular, the percentage of program costs devoted to administration was found to vary inversely with program size—ranging from a substantial proportion in smaller programs to a moderate percentage of larger ones.

As the wide range of cost estimates suggests, measuring the fiscal burden of federal administrative requirements was not a simple or precise task. In fact, methodological difficulties led the authors of this report to employ two very different methodologies for assessing paperwork impacts, producing somewhat different cost estimates. At the local level, a sample of six municipalities and nine counties was selected for further study. Data was collected on five different federal programs overall, but no more than two programs were examined in any one community. Of the programs studied, two were block grants (CETA and CDBG), one was a formula categorical grant (urban highways), and one was the Census Bureau's data collection survey. Only one program (wastewater treatment) was among the group of new intergovernmental regulations that is the subject of this ACIR volume, and this program was studied in only one community.

The methodology used to study paperwork costs at the state level was very different. Rather than utilizing program audits in a sample of jurisdictions, administrative costs were distilled from a detailed analysis of the California state budget, supplemented by a Texas Welfare Department analysis of reporting burdens in health and welfare programs. Consequently, federal paperwork costs differed somewhat in the state portion of the report. The California budget analysis produced an estimate of "federally induced administrative costs"—those resulting from federal administrative requirements—of $546 million in FY 1978.[44] Extrapolating this to the nation as a whole would place federally induced administrative costs at $6.5 billion among the states alone, a figure that contrasts sharply with the academy's overall estimate of $2–5 billion in paperwork costs for all subnational governments.[45] This discrepancy reflects the budget's overstatement of federal paperwork and administrative burdens by including certain administrative tasks that would be performed in the absence of a federal requirement.

On the other hand, research by the Texas Department of Welfare suggests that the federal government seriously underestimates the paperwork burden it imposes on the states. In the health and welfare area alone, the actual time required to complete federal reporting forms was three times longer than that estimated by federal officials.[46]

The above findings were supplemented by additional Paperwork Commission research on individual regulatory programs and specific functional areas. For example, the Commission's study of equal employment opportunity programs found that completing a single EEOC form cost state and local governments $5.3 million annually.[47] In education, the Commission observed that reliable data on paperwork costs had not yet been developed, although a group of private schools put the cost of federal red tape at $47.00 per student.[48] Based on the entire range of studies, however, the most important effects of federal reporting and paperwork requirements appeared to be administrative rather than fiscal in nature. Duplicative, competing and unnecessary requirements were found to impose a range of nonfiscal costs, including inefficiency, confusion, and poor program performance.[49] In one case, federal regulatory preemption led to "serious incidents of unnecessary [radioactive] exposure" that might "not have occurred" under an earlier state program.[50]

In short, several reports by the Commission on Federal Paperwork highlight numerous problems with this facet of federal intergovernmental regulation. Although most of the reports focus on programs beyond the scope of this study, and despite methodological problems encountered in measuring the fiscal costs of federal paperwork, the study as a whole helps to illuminate the magnitude and scope of federal administrative requirements.

NACo Survey on Federal Regulation

The National Association of Counties released its survey on federal regulation in early 1981. This was a highly focused report in terms of both the number of jurisdictions sampled and the type and number of federal regulations examined. Seven counties, differing widely in size and geographic location, were asked to select the ten most burdensome requirements affecting them from a list of 59 crosscutting federal aid requirements identified by OMB. The

Figure 5–1

Rankings of Most Burdensome Federal Crosscutting Regulations by Seven Counties

RURAL COUNTIES		URBAN COUNTIES			SUBURBAN COUNTIES	
Faulk, SD	**Preble, OH**	**Dade, FL**	**Montgomery, MD**	**Summit, OH**	**Travis, TX**	**Racine, WI**
Ten Most Burdensome Crosscutting Requirements (Ranked)						
1 Davis-Bacon	504 Handicap	Davis-Bacon	National Environmental Policy	Relocation Act	Davis-Bacon	504 Handicap
2 Citizen Participation	NEPA	504 Handicap	504 Handicap	Uniform Administration (A–102)	Civil Rights Act of 1964-Title VI	Davis-Bacon
3 504 Handicap	Architectural Barriers Act	Age Discrimination	Relocation Assistance	Cost Principles (FMC–74–4)	Intergovernmental Personnel Act	Uniform Relocation
4 Cost Principles (FMC–74–4)	Executive Order 11246	Cost Principles (FMC–74–4)	Uniform Administration (A–102)	Davis-Bacon	—	Notification & Comment
5 Reporting Requirements (A–40)	Davis-Bacon	NEPA	Cost Principles (FMC–74–4)	Civil Rights Act of 1964-Title VI	Notification & Comment (A–95)	Civil Rights Act of 1964-Title VI
6 Fish & Wildlife Coordination	Cost Principles (FMC–74–4)	—	Historic Preservation	504 Handicap	Uniform Administration (A–102)	Historic Preservation
7 DOC Directives on Statistics	Audit Circular (A–73)	Notification & Comment (A–95)	Notification & Comment (A–95)	Executive Order 11246	Freedom of Information	Executive Order 11246
8 Uniform Administration (A–102)	Notification & Comment (A–95)	Joint Funding (A–111)	—	Architectural Barriers Act	Privacy Act	Executive Order 11246
9 Audit Circular (A–73)	Work Hours & Safety Standards	—	—	Privacy Act	—	—
10 NEPA	Civil Rights Act of 1964-Title VI	—	—	Freedom of Information	—	—
Two Most Burdensome Socio-Economic Requirements						
1 Davis-Bacon	504 Handicap	Davis-Bacon	National Environmental Protection Act	Civil Rights Act of 1964-Title VI	Davis-Bacon	504 Handicap
2 504 Handicap	NEPA	504 Handicap	504 Handicap	504 Handicap	Civil Rights Act of 1964-TitleVI	Davis-Bacon

SOURCE: National Association of Counties, "The Effects of Crosscutting Requirements on County Government," memorandum (Washington, DC: National Association of Counties, February 19, 1981), Table A.

sample counties were then requested to illustrate specific problems and positive features associated with such mandates and to suggest potential reforms.

The results of the NACo survey provide a useful complement to studies on the fiscal impact of federal regulations. As expected, the sample counties resented the costs imposed by federal mandates. The "heavy financial burden" and "excessive costs" associated with the Section 504 and *Davis-Bacon* requirements were singled out for special attention.[51] However, the NACo study placed even greater emphasis on the nonfiscal consequences of mandates, particularly their effects on local governmental processes and decisionmaking. The "enormous cumulative burden" of federal crosscutting requirements was said to frustrate effective implementation of program goals and to distort local priorities. "Most importantly," concluded the NACo study, these requirements "confuse the recipients' management process," raising "serious questions [about their] true benefits."[52]

The seven counties surveyed differed somewhat in their overall selections of problem mandates. However, more than half of the total universe of 59 crosscutting requirements were not identified as especially troublesome by even one county. (See *Figure 5-1*.) In addition, the responding jurisdictions showed considerable agreement in selecting the two most burdensome requirements. The Section 504 handicapped regulations were identified by six of the seven counties as one of the two most burdensome socio-economic requirements (see *Figure 5–1*). The *Davis-Bacon Act* was placed in the same category by four counties, while NEPA and Title VI of the 1964 *Civil Rights Act* were selected by two counties each. Among the purely administrative regulations, three counties each selected the A–95 coordination process, the FMC–74–4 cost principles requirements, or the A–102 uniform administrative requirements as the most burdensome procedures.

Individual complaints about specific mandates dealt with both administrative obstacles and concerns about costs. Section 504 was called "enormously expensive" by one county, which argued that its costs resulted in reduced services for all other citizens.[53] There was particular agreement that the costs of retrofitting existing facilities and vehicles, in order to provide equal access to handicapped users, would be prohibitive.[54] On the other hand, several jurisdictions replied that the 504 requirements contained useful standards for constructing new facilities.

The *Davis-Bacon Act* also was said by several counties to "significantly increase costs" in federally assisted construction projects.[55] Dade County, for example, estimated that construction costs were 5% higher for federally assisted projects covered by Davis-Bacon than for local projects unaffected by the law.[56] None of the respondents identified any useful attributes of the requirement.

While criticisms of NEPA included cost as one factor, delays and administrative burdens imposed by the requirement appeared to be more serious. One county complained that the requirements of the Act were so complex that it had spawned a "consultant empire" to accommodate them. Another argued that NEPA was "viewed as an opportunity for citizens to delay necessary projects."[57] Yet, the purpose of the act was generally supported, so long as its procedures could be streamlined. One county even reported having adopted the concept in evaluating one of its own, non-federally funded projects. In other areas as well, respondents tended to object to the specific procedures and the cumulative weight of crosscutting regulations rather than to their general intent.

National League of Cities Surveys

Two additional surveys of local officials' views toward federal intergovernmental regulation were conducted by the National League of Cities (NLC) in late 1980 and early 1981. The methodology used in these surveys was very different from that employed by NACo, however. Rather than focusing on in-depth evaluations of mandates by a select group of jurisdictions, the NLC surveyed more generalized attitudes toward mandates among a broad cross-section of city officials.

The primary NLC survey was conducted in the fall of 1980. Of the 1,601 NLC members who received questionnaires, 928 responded.[58] Three major questions were asked concerning

Table 5–9

Assessing the Relative Costs and Benefits of Federal Regulations: City Officials' Ranking of 21 Requirements
(in percent)

FEDERAL REGULATION (ranked in order of relative perceived cost)	Percent of cities affected	RELATIVE TO THE PUBLIC GOOD SERVED, THE COST IS . .				
		Quite low	Reasonable	Somewhat high	Much too high	Not sure
Environmental impact review, process requirements	84%	4%	24%	33%	36%	2%
Bus design & procurements requirements	41	2	22	22	39	10
Wastewater treatment requirement	86	6	30	29	34	2
Public education requirements for special population groups	46	4	28	30	28	6
Contractor & subcontractor requirements	83	5	30	30	30	4
Accessibility requirements for handicapped persons	89	6	34	33	27	1
Uniform relocation assistance requirements	58	5	33	36	21	3
Occupational Safety & Health Act requirements	80	6	32	34	21	5
Highway design & construction requirements	67	5	36	31	22	6
Requirements for unemployment compensation for city employees	78	5	38	31	21	4
Air pollution control requirements	67	10	32	25	25	6

Table 5–9 (continued)

Assessing the Relative Costs and Benefits of Federal Regulations: City Officials' Ranking of 21 Requirements (in percent)

FEDERAL REGULATION (ranked in order of relative perceived cost)	Percent of cities affected	RELATIVE TO THE PUBLIC GOOD SERVED, THE COST IS . .				
		Quite low	Reasonable	Somewhat high	Much too high	Not sure
Small business or minority-owned business procurement requirements	54	7	37	30	20	6
Accounting, auditing, reporting & evaluation procedures & requirements	88	5	43	36	15	2
Planning process requirements for various programs	81	7	43	33	15	2
Safe drinking water requirements & procedures	81	11	47	23	16	3
Nondiscrimination or affirmative action requirements	89	13	46	22	17	1
Airport construction & operations requirements	50	6	50	22	12	8
Historic preservation requirements & procedures	71	11	48	23	11	4
Minimum wage law requirements	84	11	51	23	12	4
Flood disaster protection requirements	67	13	51	21	10	5
Citizen participation or public hearing procedures	92	20	49	21	9	0

SOURCE: National League of Cities, "Municipal and Program Survey," unpublished tabulation (Washington, DC: National League of Cities, 1981), pp. 6–8.

federal regulations. They sought to determine what proportion of cities were affected by 21 federal mandates, mayors' evaluations of the relative costs and benefits of these mandates, and their general assessments of the goals and implementation of federal requirements in general.

Essentially, the regulations identified by NLC members as too costly (relative to the benefits derived) resemble the lists of burdensome requirements compiled by NACo and others. The Environmental Impact Statement process required by NEPA was identified as "too costly" by the greatest percentage of respondents, followed closely by design requirements affecting federally assisted purchases of new buses (see *Table 5–9*). Federal regulations concerning water treatment facilities, the education of special students, and prevailing wages in construction projects *(Davis-Bacon)* were among the five requirements deemed unreasonably costly by local officials.

On the other hand, certain federal regulations were judged to have low or reasonable costs compared to the public benefits derived. Citizen participation, flood protection, minimum wage requirements, historic preservation, and racial nondiscrimination requirements were all included in this category. In fact, eight of the 21 federal regulations in the survey were judged to have "low" or "reasonable" costs by a plurality of responding city officials. Moreover, only two regulations stand out as being inordinately expensive relative to their perceived public good: the environmental impact review and bus design requirements, although *Davis-Bacon* and the *Clean Water Act* nearly fall into this category also. These were the only cases in which a greater percentage of NLC members judged regulatory costs to be "much too high" than judged them to be "low" or "reasonable" (see *Table 5–9*).

Many of these findings were reinforced in a subsequent survey of city officials undertaken by the National League of Cities in the winter of 1981. The views of 600 city officials were surveyed to determine which regulations they believed most urgently required alteration by the federal government. Many of the same requirements were identified as burdensome as in earlier surveys, although the ordering of regulatory burdens varied somewhat. The five requirements identified as most in need of alteration in this survey were: wastewater treatment, environmental impact review, Section 504, safe drinking water regulations and air pollution control requirements.[59] As in the earlier survey, uniform relocation, historic preservation and flood disaster requirements were near the bottom of this scale of urgency (see *Table 5–10*).

Apart from variations in assessments of specific regulations, local opinion toward federal mandates overall tends to be strongly negative. This general antipathy may reflect the cumulative impact of multiple federal requirements

Table 5–10

How City Officials View U.S. Regulatory Programs

QUESTION: *"How important is it that the administration act to alleviate the burdens caused by present federal regulations or requirements on the following subjects?"*

	Percent Saying Urgent or Important
Wastewater Treatment	86
Environmental Impact Review	80
Accessibility for the Handicapped	77
Safe Drinking Water	74
Air Pollution Control	70
Occupational Safety and Health	68
Prevailing Wages	68
Nondiscrimination or Affirmative Action	64
Public Education for Special Groups	58
Flood Disaster Protection	56
Historic Preservation	56
Uniform Relocation Assistance	49

SOURCE: Based upon Clint Page, "NLC Surveys Members on Federal Rules," *Nation's Cities Weekly*, April 6, 1981, p. 10.

Table 5–11

Overall Evaluations of the Federal Role in Regulation (in percent)*

	Agree in most or all cases	Depends	Disagee in most or all cases
Requirements result from the federal government playing an *inappropriate role* ....**	40%	36%	19%
My municipal government *does not have the resources* (money, time, know-how) to comply	39	30	27
Federal agency implementation is inefficient, *making* compliance difficult	65	23	6
The federal government *goes too far* in specifying the means of achieving mandated objectives	51	27	16
The mandated standards are *unrealistic*	50	34	12
The basic goals and objectives of the mandates are *desirable*	48	33	15

* Percentages do not total 100% across because some respondents failed to reply.

** Original emphasis.

SOURCE: Based upon National League of Cities, "Municipal Policy and Program Survey," unpublished tabulation (Washington, DC: National League of Cities, 1981).

and opposition to the nonfiscal consequences of federal regulations, neither of which were explicitly measured by survey questions dealing with the costliness of individual mandates. Thus, 65% of respondents believe that federal agency implementation of mandates is generally inefficient, compared to only 6% who maintain it is usually efficient.[60] (See *Table 5–11.*) Fifty percent believe that federal standards are not realistic most of the time, compared to 12% who believe they usually are. Forty percent of responding city officials believe that the federal mandating role is inappropriate in most or all cases, while 19% believe that it is generally acceptable. On the other hand, the basic goals of federal regulations received considerable approval from local officials. Forty-eight percent of those responding characterized regulatory goals as generally desirable, while only 15% considered them unwarranted.

The General Accounting Office Report to Senator Roth

In an unpublished letter report to Sen. William Roth (R-DE), the U.S. General Accounting Office attempted a modest evaluation of the impact of several crosscutting federal regulations on selected local governments.[61] This 12-page study was a very brief exploration into federal administration of crosscutting regulations in five policy areas—*Davis-Bacon*, citizen participation environmental impact, equal employment opportunity and equal delivery of services. Unfortunately, the study included grant specific requirements as well as truly crosscutting ones, and regulatory implementation was examined only in four cities: Albany and Schenectady, NY, and Norfolk and Virginia Beach, VA. Nevertheless, two valuable points concerning the local impact of these regulations were made.

First, the GAO examiners found that cost estimates of the fiscal impact of federal regulations could not be attempted in these instances. Most of the necessary data were not collected by local governments in the form required, they said. Moreover, where cost estimates were generated, the GAO deemed them unreliable for use.[62]

The GAO examination also concluded that local program officials generally "did not view the requirements as major stumbling blocks to grants management."[63] Many had already "learned the ropes" and found that federal funds paid most of the compliance costs. Also, since program administrators dealt only with requirements attached to individual programs, they were able to avoid many of the conflicts among the total array of regulations applying to federal programs as a whole.

STUDIES OF MANDATE IMPACTS ON SINGLE JURISDICTIONS

All of the preceding studies attempted, to a greater or lesser extent, to compare the effects of federal mandates in several different jurisdictions. In addition, some research has been conducted on the effects of federal regulations in single jurisdictions. Like the multijurisdictional studies, these efforts vary greatly in their approach, sophistication, and scope. Some have attempted to measure the actual dollar costs of selected mandates in a community, while others have been more impressionistic attempts to identify a few particularly burdensome requirements.

The New York City Research

The most detailed and widely disseminated analysis of mandate impacts on a single jurisdiction was undertaken by the New York City Budget Office during 1979 and 1980 under the direction of Mayor Edward Koch. The New York Budget Office attempted to determine the actual costs imposed by a variety of state and federal regulations, and some of the results were highlighted in a speech given by the mayor in January 1980.[64]

Although Mayor Koch's speech focused on a few "increasingly draconian mandates" passed in recent years, the budget office analyses implicitly assumed a very broad definition of intergovernmental "mandate." Both state and federal regulations were examined, including court decisions and grant-specific regulatory requirements that fall beyond the scope of this ACIR study. Of a total 47 mandates identified by New York City in1980, more than half were derived from state rather than federal requirements.[65] Other regulations, such as air and water pollution requirements, were classified as joint federal-state mandates since they derived from state implementation of federal standards. Only 11 regulations in the NYC study were considered direct federal mandates, lacking any state participation.[66] Some of the most troublesome of these last two groups fall within the scope of intergovernmental regulations being studied in this volume.

REGULATIONS ON THE HANDICAPPED

Department of Transportation regulations designed to implement Section 504 were the most costly federal regulations affecting New York City.[67] In particular, the cost of providing accessibility for handicapped individuals was estimated to be $1.3 billion in capital costs during the next 30 years, plus $50 million annually in operating expenses.[68] In addition, 5,750 buses would have to be made accessible during this period.[69] These changes were designed to improve transit service to a potential ridership population of 23,000 persons in wheelchairs and 110,000 semi-ambulatory persons. The city, however, maintained that these services could only be provided at the expense of 5.3 million persons who currently use the transit system daily.[70]

Federal regulations concerning the education of handicapped children were also challenged in the New York study. Because the city is responsible for public education, PL 94–142—the *Education for All Handicapped Students Act*—requires that it provide a "free and appropriate" education to all children.

This has forced a rapid increase in special education spending, which rose 112% between 1975 and 1981. It reached an estimated total of $278 million by 1981, of which $12 million was federal aid.[71] In contrast, total spending on education rose only 18.6% during this period, largely due to the increase in special education. An additional $33.5 million in architectural modifications was estimated to result from Section 504 requirements to enhance access of handicapped students to elementary and secondary education. Another $1 million will be required to remove architectural barriers in city colleges and universities.[72] Although these costs are impressive, the New York data does not adequately distinguish between the special education costs attributable wholly to federal regulations and the portion of total costs the city would undertake independently.

ENVIRONMENTAL REGULATIONS

Two federal environmental regulations also were singled out by Mayor Koch as imposing unreasonable burdens on New York City. One involves the operation of the *Clean Water Act*. The federal government requires plants to be built and operated at the secondary treatment level, which the city has done. However, the city maintains that it is unnecessary to operate at this level year around in order to meet prescribed water quality standards. Operating at this higher level all year will cost the city an estimated $10 million in 1981 for what is described as an unnecessary level of water quality.[73]

Another federal environmental mandate will halt New York City's practice of dumping sewage treatment residue ("sludge") into the ocean.[74] Because no long term alternative is yet available, the city is required to construct a landfill site for sludge on a temporary basis. Although federal grants will cover 75% of the capital costs of landfill construction and state aid will pick up an additional portion, this system is estimated to cost the city $41 million in operating expenses and $31 million in capital costs during 1982 and 1983.[75] This compares with current annual costs of two million for the ocean dumping program. Once a permanent strategy for safely disposing sludge is developed, this will have to be adopted, and the temporary landfill will be abandoned.[76]

Fairfax County

In 1978, the Board of Supervisors in Fairfax County, VA, commissioned a brief staff report on the fiscal effects of state and federal mandates on county finances.[77] As in most other studies, the definition of mandates utilized in the study was very broad. Programs examined included an array of intergovernmental regulations, including adminsitrative and program requirements attached to specific federal grants and county services required under Virginia law and the state constitution. Although dollar figures were assigned to various intergovernmental regulations, there is no way to assess their quality. Cost estimates made by various departments were simply compiled with little narrative or discussion of actual versus preferred costs. Full compliance also appeared to be assumed in most cases.

Among the most significant federal mandates affecting the Fairfax County budget were the *Clean Air Act*, the *Clean Water Act*, and the *Civil Rights Act of 1964*. The estimated cost of these regulations ranged from approximately $3 million under the *Clean Water Act* to an estimated $79,000 for implementing civil rights requirements. Other major programs identified by the county as expensive "mandates" were the *Social Security Act*, which required $3.7 million in employer contributions for workers covered by the act, and administrative and matching costs required under AFDC and the Title XX social service grant program.[78]

The Fairfax study also listed federal requirements affecting the Fairfax County Board of Education. The most expensive educational regulations were special education services and expanded access to handicapped students required under PL 94–142 and Section 504. The costs resulting from these requirements were placed at $15.1 million in operating costs for FY 1978 and $2.8 million in construction outlays. Other fiscally significant items included federally required levels of bilingual education, costing $980,000, and Title IX sex discrimination regulations, civil rights reporting requirements, and compliance with OSHA regulations—each estimated to cost $100,000 per year.

Overall, federal mandates were estimated to impose $15.8 million in additional costs on

Fairfax County government, equal to approximately 3% of the county budget. Additional funding equal to 40% or 45% of this figure was provided by federal grants under these programs. However, this figure does not include all of the programs just discussed, since those which required a high degree of voluntary participation on the county's part were deleted from the total.[79]

By way of contrast, state mandates were estimated to total $35.6 million in Fairfax County in FY 1978, or approximately 7% of the county budget. State aid and reimbursement on these programs provided an additional 20–25% funding for these programs. As in New York, however, the relationship between federal and state mandates is frequently complex. Certain mandates which appear to local government to emanate from the state may ultimately be traced to federal regulations or grant requirements imposed upon the state. For example, operating costs for air pollution scrubbers installed in Fairfax incinerators result from state regulations and are identified by the county as a state mandate, although the state regulations in this instance apparently were prompted by federal air quality standards.

Janesville

A final, very brief sketch of regulatory impacts was provided in an impressionistic study of federal regulation in Janesville, WI. In 1979, the U.S. Regulatory Council commissioned a free-lance journalist to ascertain people's views toward regulation in a typical small city, and a short anecdotal survey was produced. The bulk of federal regulations examined affected the private sector, but a few were intergovernmental in character.

For example, Janesville officials criticized the *Safe Drinking Water Act* for mandating excessive, inflexible testing and public notification procedures.[80] Necessary procedures were already being carried out by the city, they maintained. In addition, the city was concerned about forthcoming regulations governing the monitoring of industrial effluents in the city waste water treatment plant. It preferred to monitor these effluents centrally and trace problems once detected, rather than begin on a plant-by-plant basis. The prospective regulations were estimated to cost the city $50,000 to $60,000 annually.[81] Another problem regulation involved state administration of the *Highway Beautification Act*. An attorney involved believed that state administrators had improperly declared a billboard illegal in order to avoid paying compensation fees for billboard removal, as required under federal law.

Apart from such federal-state regulations, several wholly state mandates were touched on also, affecting both the local public and private sectors.[82] In addition, certain program specific requirements were discussed in the study, such as citizen participation and planning requirements attached to a mass transportation grant.

STATE IMPACTS

The studies just reviewed all dealt with the effects of federal (and state) mandates on local units of government. However, state governments can also be seriously affected by federal regulations. Although this topic has been subject to much less research than local regulatory impacts, a few studies do concern the state effects of federal regulation. One is a study of state implementation of federal-state environmental programs. A second examines the costs of several federal regulations in higher education, including state colleges and universities. Finally, two reports bearing on regulatory impacts have been produced by the National Governors' Association. These examined the burdens of federal red tape and presented the governors' recommendations to the Presidential Task Force on Regulatory Relief.

GAO Environmental Report

In its report on *Federal-State Environmental Programs—The State Perspective*,[83] the General Accounting Office examined state views toward five different grant and regulatory programs: the *Clean Water Act; Clean Air Act; Federal Insecticide, Fungicide, and Rodenticide Act; Resource Conservation and Recovery Act;* and *Safe Drinking Water Act*.[84] Each of these programs can be classified as a "partial pre-emption," which utilizes both state and federal participation. The federal Environmental Protection Agency (EPA) establishes environmental standards, issues regulations, awards grants, and directly administers the program in states that do not participate, while participating states implement the programs within the guidelines established by EPA. Ideally, the programs were envisioned as "partnership" arrangements between the state and federal levels of government.

In truth, this partnership ideal was widely regarded by states as a "myth."[85] In its conclusion, the GAO gave substance to this view, issuing a general indictment of EPA performance:

> Numerous studies and EPA testimony have pointed out marked differences between individual states. Yet, states claim EPA regulations generally treat all states the same and require individual states to force themselves into an ill-fitting national mold. State initiatives and managerial prerogatives are stifled, and costs for environmental controls are often increased.[86]

Unlike studies of mandates at the local level, however, the primary problems highlighted in state environmental programs were not fiscal ones. The availability of federal funds did not emerge as a pressing problem for most states.[87] Rather, administrative and performance costs resulting from federal mandates were identified as being most troublesome.[88]

When regulations hamper rather than promote the effective achievement of a policy goal, this can be considered a performance cost. Generally speaking, states were found to support the goals of environmental programs in the GAO report,[89] but federal regulations were found to have what one administrator called a "deadening effect" upon the states' ability to achieve these goals.[90] Frequent changes in federal standards and guidelines wasted state resources and impeded program momentum.[91] Delays in issuing federal regulations were said to "handicap program implementation."[92] Inflexible regulations undermined effective existing state programs and ignored substantive differences among various states.[93]

Similarly, the GAO found that federal environmental mandates may impose substantial administrative costs on state governments. One report noted that the paperwork burden under the *Clean Water Act* "approximately doubles the necessary resources" required to do the job.[94] A state administrator complained that the waste treatment construction program had become "a bureaucratic paperwork procedural jungle with no relationship to water quality."[95] The end result was to limit the states' own management prerogatives in program administration.

Federal Mandates in Higher Education

In 1976, the American Council on Education published a report detailing the costs imposed by 12 federal regulations on a sample of six colleges and universities. This study was only partially applicable to state educational institutions since four of the six schools examined were privately operated. Nevertheless, the study does illustrate some of the fiscal effects of federal regulation in this functional area during the decade between 1965 and 1975.

Overall, the costs of the federal regulations examined were found to total from 1% to 4% of the operating budgets of the institutions surveyed.[96] This proportion appeared to be growing since mandated costs were rising faster than either institutional revenues or average educational costs.[97] Operationally, mandated expenditures were found to have grown to between one-eighth and one-fourth of general administrative costs. As a consequence, they tended to alter educational administrative structures by contributing to the centralization of institutional administration.[98]

As with most impact studies, this information must be interpreted cautiously. The largest single expense for many educational institutions in this study resulted from increased Social Security employer benefits, and another significant expense was the federal minimum wage law. Naturally, such laws are excluded from most conceptualizations of federal "mandates." Moreover, provisions such as social security do not apply to many public institutions. On the other hand, several recent and potentially costly federal mandates were not included in the study, such as Title IX, Section 504, and the *Family Educational Rights and Privacy Act*. Although such exclusions were unfortunate, their absence from the study tends to counterbalance the inclusion of other questionable mandates.

In the two public institutions included in this study, only one was subject to Social Security. Ignoring this provision, the preeminent mandated expense in both public schools stemmed from equal opportunity and affirmative action requirements.[99] Included in this category were Title VII of the *Civil Rights Act*, the *Equal Pay Act of 1963*, and Executive Order 11246. Another costly set of requirements for one of the institutions included environmental protection regulations and OSHA compliance.[100] However, the costs associated with unemployment compensation, federally mandated retirement benefits (ERISA), health maintenance organizations, and age discrimination requirements were negligible or not applicable to the two public institutions examined in 1975.

Governors' Association Reports on Federal Paperwork and Regulatory Burdens

Recently, the National Governors' Association (NGA)[101] produced two reports examining aspects of the mandate issue that particularly concern state governments. These reports were not regulatory impact studies as such, since they were designed primarily to inform federal officials of changes recommended by the states in selected federal mandates. They did not study impacts in depth or try to measure the fiscal or administrative costs of regulation. Nevertheless, in the course of making recommendations, the NGA reports served to highlight problem areas in regulation and to identify certain deleterious effects perceived by state governments.

The first report, *Federal Roadblocks to Efficient State Government*, was developed in 1976 for the federal Office of Management and Budget.[102] The study was not a comprehensive one because data was derived from only a few participating states. Moreover, only regulations subject to federal executive branch discretion were examined. Those derived from specific statutory language were deleted for the purposes of this study. Discretionary regulations were defined to include many program specific grant requirements, however.

Substantively, the *Roadblocks* report identified six fundamental problems caused by federal mandates. These were:

- the lack of coordination among federal departments and agencies implementing regulations, which limits program effectiveness;
- the federal government exceeding its authority in certain areas and encroaching on state prerogatives;
- federal regulations that are prescriptive and process oriented rather than results oriented;
- programs entailing excessive paperwork and reporting requirements;
- delays that hinder program funding and implementation; and
- implementation of indirect cost determination procedures, creating lasting administrative confusion.[103]

The greatest difficulties for states resulted, not from these six problems individually, but from their cumulative effects on state governments in general. Such impacts included administrative, fiscal, and performance costs. The administrative problems were evident in the six statements listed above. Federal regulations entailed "excessive reporting and paperwork requirements" and "administrative burdens."[104] Fiscally, the NGA complained that mandates imposed increased staffing and other costs, and it concluded that:

> Compliance . . . often results in expenditures that would not have been necessary if the state[s] had been free to develop its own procedures.[105]

Likewise, performance costs resulted from malapportioned resources, decreased service levels, and restrictions that "stifle innovative concepts."[106]

A sampling of specific regulatory cases illustrated these problems in more detail. For example, Environmental Impact Statement (EIS) requirements have been subject to different interpretations by federal agencies. In one case, a single EIS was approved for a bridge project by the Federal Highway Administration but rejected by the Coast Guard for the same project.[107] In addition, FAA comprehensive planning requirements for airport capital grants have required Environmental Impact Statements for all related projects in the area, including those which are wholly state funded.

Civil rights regulations were also criticized for spawning "a highly complex and burdensome reporting system."[108] The University of Wisconsin was required to submit 16 volumes and 6,000 pages of data on employment actions to the Office of Civil Rights. Additional months were required to reformulate this same data for submission to the Equal Employment Opportunities Commission (EEOC). Similarly, the EEOC has required different data sets from the State of Oregon and from its higher education system. This forced the higher education system to compile double sets of data for the same federal agency.

Paperwork burdens were also problems under *Davis-Bacon* and clean water regulations. The *Clean Water Act* required annual duplication of a wealth of plans and documents, even when there had been no change. The *Davis-Bacon* wage scales have been subject to rapid change, requiring the alteration of bids and contracts under negotiation. Likewise, "constant revision" of *Clean Air Act* regulations placed "administrative burdens" on the states.[109] Just detecting changes cost Wisconsin an estimated $50,000 annually, because:

> Each new regulation must be screened and reviewed to determine if it conflicts with state law and rules, whether state resources are available to comply, whether the true deadlines can be met, and what implementation will cost.[110]

ELIMINATING ROADBLOCKS

In 1981, the National Governors' Association followed up on the *Roadblocks* study in its recommendations to the Presidential Task Force on Regultory Relief. In a report entitled *Eliminating Roadblocks to Efficient State Government*, the NGA made recommendations for dealing with many of the specific problem regulations identified earlier.[111] Like the original report, this was not an investigation of regulatory impacts as such, but it did establish which requirements have been perceived by governors as long term problems.

Fourteen states—though not a representative national sample—conducted comprehensive reviews of federal regulations to compile data for this "Greenbook" report. On the basis of their findings, the governors called for a "comprehensive overhaul" of federal regulatory practices:

> All existing regulations in partnership programs . . . must be examined. Moreover, a process must be established to ensure that regulations promuglated in the future are consistent with the federal and state roles in programs.[112]

Although this recommendation was based in large part on continued objections to individual grant conditions beyond the scope of this ACIR report, several of the new forms of regulatory programs identified as troublesome in 1976 were reiterated in the governors' second report. Included in this category were the *Uniform Relocation Act, Clean Air Act, Clean Water Act* and *Davis-Bacon Act*. However, specific complaints concerning the last three programs had changed somewhat since 1976. In particular, the complaints had grown more specific; there was less focus on paperwork burdens and more on costs, inflexibility and intrusion.

Three newer mandates not identified in 1976 were also included in the 1981 "Greenbook": hazardous waste management regulations under the *Resource Conservation Recovery Act*, meat and poultry inspection, and Section 504. On the other hand, two regulations identified as burdensome in 1976 were not contained in the 1981 report—the EEOC affirmative action regulations and Environmental Impact requirements.[113]

CONCLUSIONS AND GENERALIZATIONS

Over a dozen studies, surveys, and reports dealing with regulatory impacts on state and local governments have been reviewed in this chapter. Although these studies differ greatly in their scope, methodology, and certain findings, several useful generalizations about mandate impacts can be derived.

Perhaps the most significant conclusion to be drawn is that *additional sound research on* *the effects of federal mandates is required.* While current studies represent an excellent beginning, the topic is a relatively new one that is fraught with difficulties. All of the existing studies possess at least some limitations, and certain topics barely have been explored. The very concept of a regulatory impact has yet to be adequately defined, so that a universe of common subject matter is lacking. Each study uses a somewhat different definition of federal mandate, and sometimes these can be inferred only from the sample of regulations chosen for examination.

The two best studies on this topic illustrate the difficulties. The Riverside study defined the mandate universe very broadly, including state tax and revenue limitations and specific grant-in-aid administrative requirements. This expansive definition proved unworkable for estimating mandate numbers, and it merged innumerable routine and uncontroversial grant requirements with the new, more intrusive forms of intergovernmental regulation. On the other hand, the Urban Institute study attempted no explicit definition whatsoever. It merely selected for study a small number of regulatory programs that seemed particularly expensive or important.

A second limitation in the impact literature results from the focus that most studies place on the fiscal effects of intergovernmental regulation. *Fiscal impact studies face enormous obstacles in accurately measuring the costs of mandates.* In its limited survey of crosscutting regulations in four jurisdictions, the General Accounting Office observed that:

> We did not determine even rough estimates of ... administrative costs.... In general, the local governments we visited were unable to provide such estimates ... [or] we did not consider the estimate reliable.[114]

Not only is reliable data difficult to compile, many of the indirect cost factors involved, together with the locally preferred levels of services that would exist in the absence of a mandate, can only be roughly estimated. Such estimates are highly subjective and are difficult to evaluate without a thorough knowledge of local circumstances. Consequently, some studies avoid making actual cost estimates and most advise caution in appraising them.

In addition, it is hazardous to compare fiscal impact data from different studies. Apart from definitional inconsistencies, various studies estimate costs somewhat differently, and all of the study samples thus far have been small. For instance, the Riverside and UI studies both stress the importance of measuring the incremental cost of intergovernmental mandates, which calculates only that portion of a regulated activity which is actually attributable to the mandate. Individual studies, however, like the Fairfax County and New York City reports, often fail to distinguish fully between preferred expenditures and total spending on mandated activities.

Nonfiscal impacts, on the other hand, have been even less adequately treated. Reports dealing with the policy and administrative effects of intergovernmental regulations have been limited in scope and non-systematic in character. They tend to be anecdotal listings of complaints or brief surveys of perceptions toward regulations. Such sources have failed thus far to adequately detail the full extent and character of nonfiscal impacts.

The Scope of Regulatory Effects

This final limitation can be compensated for to some extent by examining the impact literature as a whole. This establishes the basis for a more complete description of the range of federal regulatory costs on state and local governments than is available in any single study. These nonfiscal costs include administrative inefficiencies, "performance costs" or reduced levels of total services, and "authority costs" which undermine the political standing of state and local governments. Such impacts may prove to be especially important in areas where fiscal costs potentially can be transferred back to the federal government, such as fields where regulations coexist with federal grant programs. For example, the budgetary appendix to the New York City study reports that costs for Section 504 compliance in the transportation field "will largely be paid for by federal capital mass transit funds currently earmarked for modernization of the system."[115]

PERFORMANCE COSTS

Transferring the costs of federal regulation to an available federal grant program implies that the initial federal purpose in the grant program may be undermined. It constitutes a form of regulatory fungibility that can erode attainment of important national objectives. Similarly, if federal regulation requires the substitution of local resources from one activity to another or leads to the impairment of existing services, a "performance cost" has been imposed on state or local government.[116] In the case of Section 504's effects on New York's transportation system, Mayor Ed Koch maintained that such performance costs would be imposed on New York City's transit users:

> [Due to Section 504] transit subsidies in the 1980s will be severely distorted—making systems accessible to several thousand people, while forsaking improvements needed on the total system. The cost in operating reliability will very likely reduce the quality of service to both current users and those who should benefit from improved accessibility.[117]

Additional examples of performance costs imposed by federal regulations can be gleaned from other impact studies. The GAO report on federal-state environmental programs observed that federal regulations could "handicap program implementation," stifle state initiative and waste resources.[118] It related one state administrator's complaint that "once a program becomes 'federalized,' the morale, efficiency and quality of output is noticeably diminished."[119] The governors' report agreed, noting that prescriptive regulations could "stifle the development of innovative concepts" and produce other negative side-effects. "In the worst cases, service levels decrease," it maintained.[120] Likewise, NACo observed that crosscutting requirements "often conflict with program goals."[121]

ADMINISTRATIVE COSTS

More familiar are the administrative burdens associated with intergovernmental regulations. The NACo report complained that crosscutting requirements "create severe administrative problems," including "duplication, paperwork, and conflicting orders."[122]; NACo also maintained that crosscutting requirements "confuse the recipient's management process," although the GAO's review of crosscutting requirements in New York and Virginia concluded that cities "did not view the requirements as major stumbling blocks to grants management."[123] A state environmental administrator complained of the "paperwork procedural jungle" in the Clean Water program.[124] The National Governors' Association condemned "excessive reporting and paperwork requirements," "administrative confusion," and delays and dislocations associated with federal regulations.[125]

POLITICAL AND LEGAL ISSUES

The question of managerial interference involves perhaps the most troublesome regulatory consequence of all—the degree to which intergovernmental regulation undermines the level of state-local autonomy required by a federal system. In the environmental programs, at least, the GAO did conclude that "state . . . managerial prerogatives are stifled."[126] Likewise, the ACE's report on higher education observed that federal requirements altered the institutional processes of universities by stimulating centralized administration.[127] Although it did not investigate them in any detail, the Riverside study observed that mandate impacts "have political and institutional as well as fiscal importance."[128]

In fact, excessively prescriptive regulations may deprive subnational governments of decisionmaking autonomy even in cases where there is general agreement over basic policy goals. Such policy prescriptiveness robs them of institutional authority in any meaningful sense and thus imposes "authority costs" on states and localities. That is, if citizens find that subnational governments have lost substantial independent influence over vital policy decisions, their authority will be eroded at the most fundamental level. They may eventually lose the capacity to effectively implement their remaining responsibilities. Consequently, the governors' complaint that the federal government "has exceeded its proper authority in some areas, encroaching on matters which are within the proper jurisdiction of the states" deserves to be considered carefully, because it poses what may become the most serious of all impacts of federal regulation.[129]

Other Findings

In addition to establishing a more complete understanding of the full range of mandate impacts, certain other generalizations about federal regulatory effects on state and local governments can be distilled from impact studies. In particular, it is clear that many *federal intergovernmental regulations do impose substantial costs of both a fiscal and nonfiscal nature.* Regulation may determine a sizable percentage of state and local spending in certain areas, as well as limit management capacity, reduce state and local flexibility, and affect the delivery of certain services. Above all, it is the cumulative effects of multiple and conflicting requirements that are most burdensome.[130]

In addition, *there has been considerable agreement among studies about which regulations have been perceived as most burdensome in recent years. Figure 5–2* lists ten federal regulations that have been identified by more than one impact study as especially problematic. They are ranked in order of their perceived impact, to the extent that this can be estimated by the number of different studies emphasizing a particular regulation and the magnitude of the costs identified. Thus, those mandates at the top of *Figure 5–2* have been interpreted as more broadly or intensively burdensome than have those at the bottom. It should be noted, however, that this ranking is based on retrospective evaluations. Most of these regulations have been subject to review and modification by past or present administrations. Some have been altered substantially since they were first criticized in the studies reviewed in this chapter. Longitudinal studies—such as the governors' two *Roadblock* reports—have produced somewhat different evaluations over time based in part, perhaps, on these changes.

Figure 5–2

Ten Burdensome Federal Mandates Identified by Regulatory Impact Studies, 1976–80*

1. Section 504 of the *Rehabilitation Act of 1973* (nondiscrimination against handicapped)
2. *Clean Water Act*
3. *Education for All Handicapped Children Act*
4. *Davis-Bacon Act*
5. *National Environmental Policy Act***
6. *Clean Air Act*
7. *Safe Drinking Water Act*
8. *Civil Rights Act of 1964*, Title VII**
9. *Civil Rights Act of 1964*, Title VI**
10. *Bilingual Education Requirements*

*Ranked in approximation of level of impact, based on the number of different studies identifying a regulation as burdensome and the magnitude of impact indicated.

**Rankings are based on prior evaluations and do not take into account regulatory modifications that may have been adopted subsequently. The regulations marked were subject to reform and simplification under the Carter Administration. Most of the remaining regulations have been modified or are under review by the Reagan Administration.

SOURCE: ACIR staff compilation.

Although there is considerable agreement among state and local officials concerning the universe of problematic regulations, individual rankings vary between different studies. In addition, it is clear that *federal mandates can affect many jurisdictions differently.* Specific agreement about "the worst" regulations is by no means complete, as was made abundantly clear in the Urban Institute and NACo reports. For example, Burlington, VT, appeared to be seriously affected by handicapped education regulations but not the *Clean Water Act*. Bilingual education imposed substantial costs in Fairfax County, VA, and Newark, NJ, but not in Cincinnati, OH.[131] The degree to which a given jurisdiction is significantly affected by any particular regulation will depend upon demographic and resource factors, its prior program activities and the state role in the field, its degree of compliance with the regulation, and other factors.

Although mandate studies generally agree that the total costs of intergovernmental regulations are substantial, *no efforts have been made to assess the benefits of such regulations*, either nationally or within the sample jurisdicitons. While most regulatory benefits presumably redound to individual citizens, the implementation of federal regulations may ultimately promise benefits to state and local governments as well.[132] However, estimation of such potential benefits is likely to prove even more difficult and speculative than approximating indirect and incremental regulatory costs.

Most studies of federal intergovernmental regulation include traditional grant requirements as well as crosscutting regulations, partial preemptions, and other relatively recent mandate forms. Grant recipients tend not to differentiate between the different forms of intergovernmental regulations and requirements despite their different levels of compulsion and intrusiveness. This is especially true of traditional requirements that are expensive.[133] For example, more than half the mandates in the New York City study stem from ordinary grant-in-aid conditions. On the other hand, the newer forms of intergovernmental regulation comprise the most consistent source of difficulties among impact studies as a whole.

Although grant consolidation is strongly supported by the ACIR and most state and local government officials, *regulatory impact studies indicate that block grants may not eliminate problems resulting from intergovernmental regulation.* Indeed, various block grants were identified as burdensome federal programs by several of the studies reviewed in this chapter.[134] Although they generally have fewer administrative stipulations than the categorical programs they replaced, existing block grants have retained numerous reporting and procedural requirements. These often prove especially troublesome for jurisdictions that did not participate in earlier grant programs. In addition, certain new forms of intergovernmental regulation—such as crosscutting requirements—may impose significant additional burdens on block grant recipients.

State "mandates" are viewed along with federal ones as serious problems by most local governments. A broad range of different state requirements may be considered in this category, including state constitutional dictates, revenue limitations, and requirements that local governments provide a range of services from stray animal control to corrections. Most studies that include state regulations and requirements conclude that these provisions impose greater costs on local government than do federal regulations but few attempts have been made to compare the relative constitutional or substantive merits of state and federal mandates. In addition, certain regulations that local governments perceive as emanating from the state house may actually have their origins in prior federal directives to the state. This is particularly true of partial preemption programs, which are administered by the states in accordance with federal standards. In addition, states may issue regulations to comply with the conditions of a federal-state grant-in-aid program. Such cases may be considered a form of "pass-through federal regulation" of local governments, roughly comparable to pass-through federal aid that is routed through the states.

Another generalization from the impact studies concerns regulatory compliance. *Most studies do not address the issue of comliance* or they assume that current levels of activity constitute full compliance. If this is not the case, then the total costs of regulation may increase if enforcement is upgraded. Those studies which have attempted to address compliance report mixed but mildly positive results. The Riverside study found that, on the whole, compliance was "substantial but far from complete."[135] Likewise, the Urban Institute study reported that "in most cases . . . local governments appear to cooperate closely with fedeal agencies," although they "can usually postpone, with relative impunity, the implementation of a mandate by relying on a number of delaying tactics."[136]

* * * * * * *

All of these findings provide important insights into the scope and nature of the mandate problem. Although it has been overlooked too long as a principal area of intergovernmental tension, an excellent beginning has been made in understanding the impacts of federal regulation on state and local governments. The seriousness of the mandate issue is now widely perceived and areas requiring additional research have been identified. Accordingly, federal intergovernmental regulation has been subject to increasing scrutiny and multiple reform efforts within the federal government. The substance and evolution of these reform efforts is the subject of the following chapter.

FOOTNOTES

[1] Catherine H. Lovell, *et al.*, *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: Graduate School of Administration, University of California, Riverside, 1979), p. 2.

[2] *Ibid.*, p. 8.

[3] *Ibid.*

[4] These were Somerset County and Trenton, NJ; Guilford County and Winston-Salem, NC; Dane County and Milwaukee, WI; Thurston County and Olympia, WA; and Orange County and San Bernadino, CA. *Ibid.*, p. 5.

[5] *Ibid.*, p. 32.

[6] Despite the definition, judicial mandates were deleted from this count.

[7] The average number of federal regulations affecting the jurisdictions studied was estimated to be about 570, although individual jurisdictions varied considerably. See Table 3–10. p. 82, in *ibid.*

[8] For example, should all the rquirements of a federal grant be considered as one "mandate," or should its application and reporting requirements be considered as separate ones, or should each indiviual component of the application be counted separately?

[9] Lovell, *Federal and State Mandating*, p. 35.

[10] *Ibid.*, p. 69.

[11] *Ibid.*, p. 71.

[12] *Ibid.*, p. 150.

[13] *Ibid.*, p. 124.

[14] *Ibid.*, p. 119.

[15] *Ibid.*, p. 151.

[16] *Ibid.*, p. 150.

[17] Apparently, the number of mandates imposed on a jurisdiction had little to do with total cost. Trenton, NJ, had over 1,000 state and federal mandates totalling an estimated 10% of local expenditures. Olympia, WA, with over 200 fewer mandates, estimated the cost at 80% of local expenditures. *Ibid.*, p. 160.

[18] *Ibid.*, p. 170.

[19] *Ibid.*, p. 179.

[20] *Ibid.*, p. 187.

[21] *Ibid.*, p. 188.

[22] *Ibid.*, p. 194.

[23] *Ibid.*, p. 195–96.

[24] Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in *Government Regulation: Achieving Social and Economic Balance*, Volume 5 of *Special Study on Economic Change*, U.S. Congress, Joint Economic Committee (Washington, DC: U.S. Government Printing Office, 1980), pp. 326–77. An abbreviated version of this work appeared in Thomas Muller and Michael Fix, "Federal Solicitude, Local Costs: The Impact of Federal Regulation on Municipal Finances," *Regulation* (July/August, 1980), pp. 29–36.

[25] Muller and Fix, "The Impact of Selected Federal Actions," p. 331.

[26] Muller and Fix, "Federal Solicitude," p. 30.

[27] Muller and Fix, "The Impact of Selected Federal Actions," p. 330.

[28] *Ibid.*, p. 332.

[29] *Ibid.*, p. 370–71.

[30] As previously noted, federal programs in which direct costs were too difficult to measure—like the *Clean Air Act*—were excluded from the study.

[31] *Ibid.*, p. 327.

[32] *Ibid.*

[33] Muller and Fix, "Federal Solicitude," p. 30.

[34] Muller and Fix, "The Impact of Selected Federal Actions," p. 368. As noted previously, these cost figures were calculated from only five of the six mandates studied, since the cost of *Davis-Bacon* was judged too difficult to measure.

[35] *Ibid.*, pp. 335, 368. These sums are in addition to the large amounts of assistance provided by the federal government to promote the construction of water treatment plants.

[36] *Ibid.*, p. 353.

[37] *Ibid.*, p. 373.

[38] *Ibid.*

[39] For instance, Fairfax County—in an independent study—defined the universe of federal mandates in a different manner than the UI study did, and its measurement of certain costs was not identical.

[40] Commission on Federal Paperwork, *Impact of Federal Paperwork on State and Local Governments: An Assessment by the Academy for Contemporary Problems* (Washington, DC: U.S. Government Printing Office, 1977).

[41] *Ibid.*, p. 6.

[42] *Ibid.*, p. 7.

[43] *Ibid.*

[44] *Ibid.*, p. 37.

[45] *Ibid.*, p. 6.

[46] *Ibid.*, p. 41.

[47] Commission on Federal Paperwork, *Equal Employment Opportunity* (Washington, DC: U.S. Government Printing Office, 1977), p. 84.

[48] Commission on Federal Paperwork, *Education* (Washington, DC: U.S. Government Printing Office, 1977), p. 13.

[49] Commission on Federal Paperwork, *Public Works* (Washington, DC: U.S. Government Printing Office, 1977), pp. 57, 63; and Commission on Federal Paperwork, *Equal Employment Opportunity*, p. 73.

[50] Commission on Federal Paperwork, *Federal/State/Local Competition* (Washington, DC: U.S. Government Printing Office, 1977), p. 25.

[51] National Association of Counties (NAC), "The Effects of Crosscutting Requirements on County Governments," memorandum (Washington, DC: NAC, February 19, 1981), pp. 3, 12.

[52] *Ibid.*, p. 12. In fact, three counties declined to apply for at least one federal grant because of the burdens imposed by crosscutting requirements. See *ibid.*, p. 13.

[53] *Ibid.*, p. 2.

[54] *Ibid.*, p. 7.

[55] *Ibid.*, p. 3.

[56] *Ibid.*

[57] *Ibid.*, p. 8.

[58] See William Davis, "Results of the NLC Poll of City Officials: Many Mandates Impose Burdens on Local Budgets," *Nation's Cities Weekly*, June 22, 1981, pp. 3, 4. See also National League of Cities, "Municipal Policy and Program Survey," memorandum (Washington, DC: National League of Cites, 1981), pp. 6–8.

[59] See Clint Page, "NLC Surveys Members on Federal Rules," *Nation's Cities Weekly* (April 6, 1981), p. 10.

[60] National League of Cities, "Municipal Policy and Program Survey," pp. 7, 8.

[61] Letter to Senator William V. Roth, Jr., from Elmer B. Staats, Comptroller General of the United States, B–146285, Washington, DC, June 21, 1979.

[62] *Ibid.*, p. 3.

[63] *Ibid.*, p. 8.

[64] This speech was subsequently published in Edward Koch, "The Mandate Millstone," *The Public Interest* 61 (Fall, 1980), pp. 42–57. More complete fiscal data is contained in New York City, Office of Management and Budget, "Analysis of Federal and State Mandates," photocopy (January 21, 1980), and City of New York, "Federal Programm, 97th Congress: Attachment A, Mandates," photocopy (January, 1981).

[65] New York Office of Management and Budget, "Analysis," pp. 1–49.

[66] Significantly, however, certain regulations that appear to New York City as originating with the state may ultimately flow from Washington via state administration of federal grants.

[67] As with other studies, these impact assessments do not take into account alternations made in Section 504 regulations during 1981.

[68] Koch, "Millstone," p. 45. These estimates were developed by the New York budget office, but their accuracy cannot be determined. Subsequent estimates developed in 1981 were less concrete. The 30–year cost of bringing the subway system into regulatory compliance was estimated to range from $1.02 billion to $1.36 billion, while operating expenses were judged to cost $60 to $100 million annually. The portion of this which would actually be borne by the city is unclear, however. The 1981 mandate appendix notes that these costs "will largely be paid for by federal . . . funds" currently earmarked for other purposes. City of New York, "Attachment A, Mandates," p. 7.

[69] *Ibid.*, p. 7.

[70] Koch, "Millstone," p. 45.

[71] City of New York, "Attachment A, Mandates," p. 4.

[72] *Ibid.*, p. 8.

[73] Koch, "Millstone," p. 49.

[74] *Marine Protection Research and Sanctuaries Act Amendments of 1977.* PL 95–153.

[75] New York OMB, "Analysis," p. 13.

[76] Koch, "Millstone," p. 48.

[77] Leonard Wharton, County Executive, "Federal/State Mandated Programs Summary," memorandum to the Fairfax County Board of Supervisors (September 11, 1978).

[78] *Ibid.*, Appendix I. All figures are for FY 1978.

[79] The *Clean Air Act* was the major federal regulation identified in this category. The local role in this program was considered a "permissive" one, since the state and federal governments would administer the program locally in the absence of county participation.

[80] U.S. Regulatory Council, Regulation: The View from Janesville, Wisconsin (Washington, DC: U.S. Regulatory Council, March 1980), p. 25.

[81] *Ibid.*, pp. 26–27.

[82] *Ibid.*, p. 33.

[83] U.S. General Accounting Office, *Federal-State Environmental Programs—The State Perspective* (Washington, DC: U.S. Government Printing Office, 1980).

[84] For descriptions of these programs, see *Chapter 1, Appendix 1* in this volume.

[85] U.S. General Accounting Office, *Federal-State Environmental Programs*, p. 10.

[86] *Ibid.*, p. 81.

[87] *Ibid.*, p. 17.

[88] *Ibid.*

[89] *Ibid.*, p. 57.

[90] *Ibid.*, p. 12.

[91] *Ibid.*, p. 33.

[92] *Ibid.*, p. 35.

[93] *Ibid.*, pp. 46–47

[94] *Ibid.*, p. 78.

[95] *Ibid.*

[96] Carol Van Alstyne and Sharon L. Coldren, *The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities,* Special Report, Policy Analysis Service (Washington, DC: American Council on Education, 1976), p. 14.

[97] *Ibid.*, p. 14.

[98] *Ibid.*, p. 15.

[99] *Ibid.*, p. 29.

[100] *Ibid.*

[101] Formerly the National Governors' Conference.

[102] National Governors' Conference, *Federal Roadblocks to Efficient State Government, Volume 1: A Sampling of the Effects of Federal Red Tape* (Washington, DC: National Governors' Conference, 1976).

[103] *Ibid.*, p. i.

[104] *Ibid.*, p. 2.

[105] *Ibid.*, p. 16.

[106] *Ibid.*

[107] *Ibid.*, p. 9.

[108] *Ibid.*, p. 25.

[109] *Ibid.*, p. 28.

[110] *Ibid.*

[111] National Governors' Association, *Eliminating Roadblocks to Efficient State Government, The Governors' Green Book* (Washington, DC: National Governors' Association, 1981).

[112] *Ibid.*, p. 3.

[113] During the interim period, these two sets of regulations were subject to reform efforts under the Carter Administration.

[114] Elmer B. Staats, letter to Sen. William Roth, Jr., June 21, 1979.

[115] City of New York, "Attachment A, Mandates," p. 7.

[116] Both of these effects have been described in some detail by Jackie Kimbrough and Paul T. Hill, *The Aggregate Effects of Federal Education Programs* (Santa Monica, CA: Rand Corporation, 1981). Kimbrough and Hill found that tightly restricted federal programs and mandates often clashed among themselves and interfered with legitimate local services. They also found that unfunded federal regulations drained resources away from other federal program objectives such as education of the disadvantaged.

[117] Koch, "Millstone," p. 46.

[118] U.S. General Accounting Office, *Federal-State Environmental Programs*, pp. ii, 35.

[119] *Ibid.*, p. 12.

[120] National Governors' Conference, *Federal Roadblocks to Efficient State Government*, p. 16.

[121] National Association of Counties, "The Effects of Crosscutting Requirements." p. 1.

[122] *Ibid.*, pp. 1, 8.

[123] Elmer B. Staats, letter to Sen. William Roth, Jr., June 21, 1979.

[124] U.S. General Accounting Office, *Federal-State Environmental Programs*, p. 78.

[125] National Governors' Conference, *Federal Roadblocks to Efficient State Government*, p. 12.

[126] U.S. General Accounting Office, *Federal-State Environmental Programs*, p. 8.

[127] Van Alstyne and Coldren, *Federally Mandated Social Programs*, p. 15.

[128] Lovell, *et al.*, *Federal and State Mandating*, p. 194.

[129] National Governors' Conference, *Federal Roadblocks to Efficient State Government*, p. 12.

[130] The governors' association studies and the NAC survey both emphasize this point.

[131] Muller and Fix, "The Impact of Selected Federal Actions," p. 368.

[132] For example, increased services to the handicapped may enhance their participation in the workforce and reduce future dependency.

[133] One exception is the Fairfax County study, which excluded from its estimated total cost of mandates certain regulations which it entered into willingly.

[134] See Commission on Federal Paperwork, *Impact of Federal Paperwork*, pp. 48–58; and National Governors' Association, *Eliminating Roadblocks*, pp. 22–28, 69–72.

[135] Lovell, *et al.*, *Federal and State Mandating*, p. 187.

[136] Muller and Fix, "The Impact of Selected Federal Actions," p. 373.

Chapter 6

REFORMING INTERGOVERNMENTAL REGULATION: RECENT FEDERAL INITIATIVES 1968–82

GOALS AND STRATEGIES

Previous chapters of this report traced the growth of federal intergovernmental regulation and described its impact on state and local governments. Parallel to this record is a legacy of federal regulatory reform—some of it successful, but much of it not. Shortcomings in many early reforms have encouraged the development of increasingly aggressive regulatory reform initiatives, including some of the strongest medicine yet prescribed to bring down what has been described as "regulatory fever."

Most reform initiatives have been prompted by complaints of excessive private sector burdens, not state and local ones. Only since 1980 have significant regulatory reform efforts been directed specifically at problems resulting from the new forms of intergovernmental regulation. Nevertheless, many of the earlier "across-the-board" reforms affected state and local governments in addition to the nongovernmental sector. Insofar as both categories of reforms have had a bearing on intergovernmental regulation, both have been included in this chapter.

Regulatory Reform: Quickening Its Pace, Widening Its Focus, Expanding Its Objectives

For regulation, the past decade was a period of hyperactivity among such new agencies as the Environmental Protection Agency, the Department of Energy, the Occupational Safety and Health Administration, the Consumer Product Safety Administration, and the National Highway Safety Administration. With reform, on the other hand, the period was marked by a slowly building arsenal of weapons against regulatory excess, initiated during the Ford Administration, continuing under President Carter, and culminating in several major programs launched by President Reagan immediately upon taking office in 1981. Congress also has been considering comprehensive regulatory reform legislation in 1982.

Such reform efforts mark a major shift in governmental emphasis. As Eugene Bardach and Robert Kagan recalled in their recent book on strategies for reforming social regulation, "only ten or 15 years ago the phrase 'regulatory reform' generally meant making regulations ... tougher."[1] Indeed, the rapid escalation of protective intergovernmental regulation chronicled in earlier chapters of this report may be viewed as part of this effort. Now, however, the situation has reversed. Yesterday's reforms are often viewed today as regulatory burdens.

QUICKENING PACE

As concern about regulatory burdens grew, the pace of reform increased, leading Paul MacAvoy recently to conclude that, although attempts to reform regulation are as old as regulation itself:

> The pace of reform efforts has quickened in the last decade ... with both more legislation to deregulate and more frequent attempts at internal improvements in the process.[2]

Every President since Ford has attempted to develop more comprehensive and sweeping techniques for reviewing and controlling executive agency regulation. Simultaneously, Congress has sought to bolster its traditional oversight role with new mechanisms for regulatory review and oversight and mounting attempts to enact comprehensive regulatory reform legislation. This renewed reform spirit has led some to predict a turning back of regulatory trends in the 1980s. In an effort to "rein in the regulators," reformers are striving to roll back 20 years of regulatory build-up.

Some observers regard the pace as exhilarating. In mid-1981, *Time* magazine reported;

> Of all Ronald Reagan's campaign promises, none seemed more hopelessly dreamy than his pledge to cut back on federal regulation. Presidents have come and gone, but Washington's write-a-rule bureaucrats and their regulations just seem to keep on multiplying from one Administration to the next. Yet, six months into his term, Reagan is having surprising success at reining in the regulators. The president has gone further, faster to beat back the bureaucrats and weed out their regulations than even the Administration's most ardent deregulators had hoped. Declares James C. Miller III, executive director of the Presidential Task Force on Regulatory Relief: "I came on board saying that the best we can do is bring the regulatory pendulum to a standstill. Now I think that by the end of the year we can actually achieve a real reduction in regulation."[3]

Other recent observers have been less sanguine. In a 1981 editorial in *Regulatory Eye*, reformers were warned against a "numbers game"—the practice of measuring relief by adding up relief actions taken. Noting that the Federal government can take with one hand what it gives with the other, the editorial concluded:

> The commitment to regulatory relief is clearly there. The Administration is at that dangerous point now where it must recognize and gear up for the broad scale, indepth analyses of programs that will be necessary to achieve substantial regulatory relief.... Regulatory relief can be achieved, but it is still too early to say whether this Administration will achieve it.[4]

Overall, the record of the last decade supports the conclusion that the level of reform activity is unprecedented. But, if reform has proceeded at a faster rate than ever before, it also has headed in more directions.

EXPANDING TO SOCIAL REGULATION

As reform efforts gained momentum in the 70s they focused on economic regulation. In some cases, reformers argued that the entire structure of federal control was misguided, urging, for example, the deregulation of the air transport industry. Free market competition, they argued, offered better assurance of reasonable rates and adequate service than governmental rules and standards. Increasingly, as regulatory approaches were used to address social as well as economic problems, reform efforts also gained a foothold in this politically and analytically difficult terrain. Here the propriety of regulatory purposes, until very recently, had been unquestioned. Public and political support for such goals as environmental improvement, equality of opportunity and occupational health and safety has been strong. Thus, for the most part, the focus of regulatory reform in these areas had not been on the wholesale dismantling of federal social regulation and regulatory policy. Instead, reformers have sought to increase efficiency and effectiveness and to reduce compliance costs. Nevertheless, in an era of acknowledged scarce resources, once sacrosanct social goals are increasingly challenged as research uncovers their high price tags.

DIFFERING OBJECTIVES

Reform objectives have proliferated nearly as rapidly as reform proposals, and, as might be expected, there is at least as much disagreement over these goals as over the pace and focus of reform. The task of identifying appropriate goals has been exacerbated by seemingly intractable incompatibilities among such varied regulatory values as efficiency, effectiveness and accountability. The varying approaches of reformers and their proposals reflect this divergence of objectives. Regulatory analysts, as well as those affected by regulation generally, have tended to evaluate reforms on the basis of their own individual goals and values.

Two Roads to Reform

In general, advocates have approached regulatory reform from two distinct perspectives. The first is procedural and focuses on the processes used in all or nearly all regulatory decisionmaking and policy management. The second is substantive, emphasizing the piecemeal examination of the content of particular regulations.

Advocates on both sides have forcefully argued their preferences. Reformers have long debated whether it is possible to "change the ends by tinkering with the means" or whether "sporadic offensives" against a few visible regulations may win battles but lose the war, because they do not have sufficient institutional reserves to generate long-term impacts. Yet most "process" advocates have tended to allow a role for substantive review because they acknowledge that the ultimate aim of procedural reform is to systematically improve the substance of specific regulations. On the other hand, proponents of substantive reform have often shown less enthusiasm for procedural approaches. For example, previewing prospects for regulatory reform under the incoming Reagan Administration and reviewing the Carter Administration record, Timothy Clark concluded:

> Presidents are forever guilty of hyperbole in describing the government's achievements, and President Carter offered a fresh example on December 11 at the signing ceremony for the *Paperwork Reduction Act*. The act, he said, will "regulate the regulators" and it's "one of the most important steps we have taken ... to eliminate unnecessary federal regulations." By itself, of course, the act eliminates not a single regulation, nor is it likely that it will. While the Office of Management and Budget (OMB) might be able to use it as a management tool, it is hardly the answer people have been looking for ... [All this is] process, process, process.... All process, and either ineffective or just bad ideas.
>
> The situation will not be fundamentally changed this way.... If

> [President] Reagan does not keep his eye on substance, he will have great difficulty in reducing the government's regulatory role.[5]

Currently, public sentiment and political support is inclined toward redefining regulatory goals and reducing the federal presence directly, though a great deal of procedural reform is being undertaken or considered as well. The balance of this chapter explores the contours of both reform movements. It begins with a review of procedural reform initiatives, which were the earliest sustained attempts to modify and improve federal regulation. It then examines the evolution of substantive reforms. The chapter concludes with a series of observations about the trends apparent in regulatory reform and the prospects for success.

PROCEDURAL REFORMS: PAST, PRESENT AND PROPOSED

Four Procedural Strategies

As described earlier, procedural reforms are those involving modifictions in the ways we regulate—in the processes accompanying regulatory decisionmaking and management. This kind of reform assumes that regulatory problems can be solved or reduced by changing the conditions under which regulations are designed, written, administered and evaluated.

Advocates of process reforms find a major cause of overregulation in the practices surrounding agency rulemaking. They note that Congressional practice since the 1930s has devolved lawmaking responsibility to administrative bodies which vastly exceeds the mere "details of administration" and has led to a body of bureaucratic law that dwarfs Congressional output.[6] This tendency has been buttressed by the Court's unwillingness to invoke the "nondelegation doctrine," which once had barred statutes granting great administrative discretion to the President.[7]

When it comes to modifying these bureaucratic practices, reformers must enter the legal realm of agency rulemaking. Such reform nearly always means modifying the *Administrative Procedure Act* (APA) which, since 1946, has spelled out minimum agency rulemaking responsibilities. Under the provisions of the act, two basic methods of rulemaking are set forth: formal and informal. In practice, however, nearly all rulemaking is conducted informally. By this method, agencies publish a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* and interested parties may comment within a specified time period. The agency, in turn, may make modifications before publishing the final rule. The process is the same for promulgating new or revised rules.

Nearly all recent procedural reforms and proposals would modify the rulemaking process in some way. Some would impose new conditions on the development of rules by agencies; others attempt to elaborate on executive, legislative, judicial or public oversight and participation; still others attempt to bring a greater coherence and coordination to the complex, often conflicting pattern of agency interpretation of legislation. Many attempt to accomplish a combination of these aims simultaneously.

Overall, four major procedural reform strategies have emerged during the last decade—Presidential regulatory review and oversight; legislative review and oversight; enhanced consultation and participation in rulemaking; and standardization and coordination:

- **Presidential Regulatory Review and Oversight**
  Reforms of this nature entail the use of regulatory management techniques by executive branch agencies or by the Executive Office of the President to control the products of regulatory policymaking—either retrospectively or prospectively. The goals of this kind of reform are generally improved efficiency and/or effectiveness.

- **Legislative Review and Oversight**
  The only difference between this strategy and executive oversight is that in this case regulatory management techniques are intended to enhance Congress' role in controlling bureaucratic rulemaking. As with executive regulatory review and oversight, the goals of this strategy are principally that of efficiency and/or effectiveness, but improved accountability also may be intended.

- **Enhanced Consultation and Participation in Rulemaking**
  Reforms in this group include a wide range of techniques from increased judicial review of agency rulemaking to increased opportunities for citizen comment. All would open up the regulatory policymaking process to make it more accountable. Several would increase opportunities for state and local consultation in rulemaking.
- **Standardization and Coordination of Regulatory Requirements**
  This strategy utilizes techniques for coordinating agency interpretation of regulatory legislation as well as techniques for streamlining regulatory requirements. Methods for standardization basically seek only to ease administration of regulatory policy, not to alter it.

Figure 6-1

Major Procedural Reforms and Reform Proposals, 1968–82

Presidential Regulatory Review and Review Oversight

Agency Economic Analysis
Executive Office of the President Oversight
Paperwork Budget
Regulatory Budget

Legislative Regulatory Review and Oversight

Fiscal Notes
Legislative Veto

Enhanced Consultation and Participation in Rulemaking

OMB Circular A-85 and other Consultation Procedures
Judicial Review
Hybrid Rulemaking

Standardization and Coordination of Regulatory Requirements

OMB Circular A–102
Joint Funding
OMB Circular on Generally Applicable Requirements

Under each of the major strategies, numerous initiatives have been undertaken or proposed. *Figure 6-1* lists those which affect intergovernmental regulation. These are the subject of the balance of this chapter.

Presidential Regulatory Review and Oversight

Scientific theory and casual observation confirm that when a pebble is thrown into a pond, it produces a predictable pattern of rings upon the surface. Human relations are generally less predictable; presidents certainly enjoy little such consistency in their relations with the federal bureaucracy. Having experienced bureaucratic inertia in the face of executive enthusaism, many presidents have sought either to reorganize federal agencies or to impose new management systems upon them to increase agency responsiveness to presidential concerns. Indeed, the faith in reorganization as a means of controlling bureaucratic implementation has prompted Harold Seidman, a long-time government observer, to state somewhat irreverently that 'reorganization has become almost a religion in Washington.'"[8] Executive regulatory review and review oversight, the subject of this section, is part of such presidential reorganization efforts.

While regulatory review processes may differ somewhat, Larry Jones and Charles Maichel define regulatory review and analysis as a comprehensive process enabling timely, systematic, regular, and continuous evaluation of: (1) regulatory objectives; (2) the manner in which objectives are prescribed in legislation and are funded in the budget; (3) regulatory implementation strategies; (4) regulatory outcomes; and (5) the relevance of prior justifications for regulatory policies and programs.[9]

The process is intended to make agency regulatory decisionmaking more rational and to reduce unnecessary regulatory burdens. To accomplish these objectives, each Administration since President Ford has imposed some form of regulatory review and analysis on executive branch agencies.[10] Initially, the process was subjected to little external review, but poor agency performance under the Ford and Carter programs prompted the Reagan Administration to restructure and intensify these efforts, establishing more systematic oversight of agency procedures by the Executive Office of the President. The following sections briefly describe executive branch regulatory analysis and review programs during the last two administrations, as a prelude to the important regulatory reform efforts of the current administration.

THE FORD ECONOMIC IMPACT STATEMENT PROCESS

As part of the "Whip Inflation Now" (WIN) campaign, President Ford introduced the Inflation Impact Statement (IIS) program, establishing a largely decentralized process whereby agencies would undertake economic analyses of their regulatory proposals.[11] The program was established by EO 11821 and applied only to executive branch agencies. Due to expire in 1976, it ws continued by EO 11949 and given a new name: the Economic Impact Statement Program.

Program Operation

EO 11949 (like its predecessor, EO 11821) gave administrative responsibility for the program to the Director of OMB, but it allowed him to delegate that authority at his discretion. OMB assigned responsibility to review agency regulatory proposals and analyses to the Council on Wage and Price Stability (CWPS).

To fulfill the requirements of the executive order, each agency was to assess whether a regulatory proposal was likely to have a "major" impact.[12] OMB Circular A-107, issued on July 28, 1975, established guidelines as to what constituted a major impact. In practice, however, the rule of thumb used was an estimated impact in excess of $100 million annually.[13] If a proposal was likely to have such an impact, the promulgating agency was required to prepare an economic impact statement on it. These statements then were certified by the promulgating agency and published in the *Federal Register*.

As directed by CWPS, economic impact statements were to include an analysis of principal costs and benefits and, where practical, of secondary ones. A comparison of anticipated costs and benefits and a review of alternatives to the proposed action, together with their costs and benefits, rounded out the impact statements.

On receiving a statement, the Wage Council could approve it, or it could critique and return it. If unsatisfied by agency responses to its criticisms, CWPS could use its legislatively based authority to submit a formal statement in the relevant regulatory proceeding or possibly in a congressional hearing.[14] After having exhausted its formal authority, CWPS could (and did) bring public attention to bear on unsatisfactory impact statements through the press. Still, these largely exhortatory tools generally proved inadequate. The resulting frustration was reflected in the following comments of a CWPS official: "[Under the Economic Impact Statements program] neither CWPS nor OMB has the authority to delay implementation of or require changes in a regulatory decision, and an agency need not even acknowledge CWPS criticism, much less react to it."[15]

Program Performance

Without exception, evaluations of the economic impact statement program were negative. The program's creators had hoped that agency economic analysis, if subjected to modest oversight by the Executive Office of the President, would result in more efficient regultions. This process, in turn, would reduce the social cost of regulation and enhance equity. Neither occurred. An elaborate evaluation by CWPS staff in December 1976, concluded that compliance was frequently pro forma. Others have agreed with CWPS' assessment and identified a number of factors that contributed to the program's failure.

Jones and Maichel found that most impact statements were of poor quality. Cost estimates were dubious, benefits estimates were incomplete, and consideration of alternatives was nonexistent.[16] Implementation was further impeded because analysts did not use the best available technology. Yet, in defense of agency analysts, the "state of the art" of cost and benefit estimation was not very mature at that time. Thus, even if the reviews had been of high caliber, questions as to their accuracy would have remained.

In addition, the timing of most impact statement preparations—coming after proposals had been approved at the decisionmaking level within the agency—typically meant that such analyses were used only to justify a regulatory approach already taken. While he was assistant director of CWPS, James Miller argued that impact statements should have been used as "input at the proposal formulation stage, since that is the time when information on costs, benefits, and alternatives is most likely to affect the ultimate decision."[17]

Finally, the process suffered from its decentralized character, especially because OMB delegated much of the oversight authority to CWPS, a fledgling agency among much more established line agencies.[18] Hence, the program was viewed as an external requirement administered in a decentralized way by a fairly weak agency.

From a broader perspective, the impact statement program lacked other features that would have helped it reduce unnecessary regulatory burdens.[19] It did nothing to assess the cumulative impact of "nonmajor" rules on particular industries or governments, nor did it examine the body of existing regulations that constitutes the lion's share of current regulatory burdens.

CARTER ADMINISTRATION REGULATORY REVIEW

Problems experienced by the economic impact statement program led the Carter Administration to strengthen and expand the regulatory review and oversight process. EO 12044, issued in March 1978, was designed to correct previous quality and timing problems and to enhance presidential oversight.[20]

The new program departed from the earlier one in a number of ways. For analyses, the concept of "major" was replaced with "significant," presumably so that agencies could weigh noneconomic but still "significant" impacts in their decisions. Similarly, the cost-benefit language was softened so that rules might be judged by more than economic criteria.[21] To increase Presidential control, the Regulatory Analysis Review Group (RARG) was created in the Executive Office of the President and given both oversight and independent review functions. Oversight came through RARG's evaluation of agency regulatory reviews and its assessment of whether a proposed rule was indeed significant or not. Under the Carter program, analyses and RARG comments had to be made public, and RARG approval was required before the proposal could be published in the *Federal Register*. Apart from its oversight responsibilities, RARG annually selected ten to 20 existing rules for independent regulatory analysis. Finally, the involvement of the White House Economic Policy Review Group in regulatory oversight was intended to provide coordination in the development of regulatory policy.[22] This body was intended to promote standard agency interpretations of regulatory policy and to coordinate agency implementation in areas of shared responsibilities. In addition, it was given responsibility for resolving disputes between rARG and agencies.

An added feature of the Carter program was Section 4 of the executive order that for the first time provided a measure of "regulatory sunset." Under Section 4, agencies were required to review periodically their existing regulations to determine whether they were achieving the goals of the executive order.[23]

Program Performance

Judgments of the Carter regulatory review program are mixed. On the whole, most analysts feel that the program built on the Ford experience and had more impact on regulatory decisionmaking. Overall, reviewers attribute its improvement to strengthened central oversight, the increased attention given to regulatory policymaking inside and outside government, a growing recognition that regulatory activity was "getting out of control," and expansion of the program to existing regulations.[24]

On the negative side, progress was limited because OMB continued to require agencies to complete analyses within their existing staff capabilities.[25] Despite RARG and CWPS efforts to improve agency analytical skills, by the end of the Carter Administration very few agencies were good at regulatory analysis and some did not yet understand what it meant.[26] Moreover, both the Carter program and its predecessor let agencies determine the format for reviews and did little to set standards by which to judge them.[27] While enforcement improved under Carter, CWPS was still inconsistent in its treatment of proposed regulations. Finally, according to Christopher DeMuth, central oversight suffered because it was not systematic.[28]

Overall, then, the Ford and Carter programs shared a number of problems that reduced their effectiveness. These continuing difficulties set the stage for further strengthening of the review process by the Reagan Administration.

REAGAN ADMINISTRATION REGULATORY REVIEW

The Reagan Administration came into office on a strong platform of regulatory relief, which it viewed as a cornerstone in its economic recovery plan. As summarized by one administration official, the rationale for regulatory reform was based on four related assumptions: that prior central oversight of regulatory decisions was inadequate and needed to be patterned after the expenditure process; that a number of existing statutes were not conducive to efficient regulation because they directed regulators to ignore costs and/or benefits; that regulations have excessively relied on command/control techniques rather than on less restrictive approaches such as performance standards; and finally that where the marketplace could reasonably be expected to fulfill the regulatory purpose, the presumption should be against regulating. When regulating, agencies should adopt the regulatory approach that is the least intrusive and is directed toward an identified market failure.[29]

Based on this new perspective, the Reagan Administration has taken strong measures to reduce regulatory burdens. Through Executive Order 12291, it has strengthened the regulatory review process substantially. Its goals are to "reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regualtory process, minimize the duplication and conflict of regulations and ensure well-reasoned regulations."[30] The following regulatory standards are to be applied to all regulatory decisions:

- ☐ Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
- ☐ Regulatory activity shall not be undertaken unless the potential benefits to society from the regulation outweigh the political costs to society;
- ☐ Regulatory objectives shall be chosen to maximize the net benefits to society;
- ☐ Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society will be chosen; and,
- ☐ Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by the regulations, the condition of the national economy, and other regulatory actions contemplated for the future.[31]

Strengthened OMB Oversight

Insofar as Presidential oversight is concerned, EO 12291 establishes a very different approach from past, decentralized, largely advisory review systems. The order vests unprecedented coordination and implementation authority in the OMB Director—and, through him, in the Office of Information and Regulatory Affairs—subject to the discretion of the President's Task Force on Regulatory Relief.[32] From an historical perspective, some compare OMB's new regulatory authority to its acquisition of control over agency budget decisions in 1921 and over agency legislative proposals during the 1930s. Yet, according to the *Washington Post*, this dramatic transfer of power was not made through the usual tug and haul of bureaucratic bargaining:

> It was February 17, less than a month after the Reagan Administration took office, when the Office of Management and Budget called in the top attorneys of the executive branch regulatory agencies to have a look at the President's new executive order on regulatory policy, an order that had been in preparation for weeks.
>
> Seated around a table in a second-floor office in the Executive Office building next door to the White

> House, the attorneys began to read, several taking out pens to note changes they wanted to make or parts they found objectionable. Not until the last page—when they saw President Reagan's signature—did they realize this was not the draft of a proposed order. It was the last word.
>
> The story has become a favorite in the offices of OMB, demonstrating an abrupt and historic shift of power from the regulatory agencies and into the hands of one bureau—the Office of Management and Budget.[33]

Under the new system, the OMB Director has the authority to: (1) prescribe criteria for determining major rules;[34] (2) order that a proposed, existing or set of related rules be treated as major rules;[35] (3) order an agency not to publish a notice of proposed rulemaking (NPRM) until OMB review is completed;[36] (4) order an agency not to publish a final rule or a Regulatory Impact Anlaysis (RIA) until the agency has responded to OMB's views regarding the rule or RIA;[37] (5) issue uniform standards for developing RIAs;[38] (6) require an agency to obtain and evaluate additional data relevant to a regulation from any appropriate source;[39] (7) require interagency consultation to minimize or to eliminate rules identified as duplicative, overlapping, or conflicting;[40] (8) waive the RIA and other requirements for proposed or existing major rules;[41] and, (9) require agencies to review current effective rules an prepare RIAs for major rules in accordance with schedules established by the Director.[42]

According to a Congressional Research Service study, this unprecedented OMB authority raises a number of Constitutional questions. Nevertheless, the report notes that these powers are not unrestrained:

> Appeals from the Director's decisions may be taken to the task force and from there to the President for final resolution. The Director may not require any action that displaces an agency's responsibility under law or conflicts with any procedural requirements of the *Administrative Procedure Act* or other applicable statute. The Director must abide by the procedural requirements of the order if his comments on rules and RIAs are to be considerd by an agency and OMB's negative comments on rules and RIAs, and the agency's response must be included in the rulemaking file. Further, the order does not give OMB direct authority over the substance of agency rules nor can it prevent an agency from ever publishing a proposed or final rule.[43]

Program Operation

The executive order divides regulations into "major" rules and "all other," depending mainly on their economic impact.[44] It was estimated that for 1981, OMB reviewed nearly 50 major regulations and over 10,000 others.[45] Apart from the requirement for a memorandum of law showing that the regulation is within the authority of the agency and consistent with Congressional intent, treatment of major and other rules is substantially different.

For major rules, agencies generally are required to submit all proposed and final rules to OMB 60 days prior to their publication in the *Federal Register.*[46] "Major" rules require that a full regulatory impact analysis be undertaken and submitted to OMB, although only a brief summary need be printed in the *Federal Register.* In order to comply with OMB guidelines, such analyses should show that:

- ☐ There is adequate information concerning the need for and consequences of the proposed action.
- ☐ The potential benefits to society outweigh the potential costs.
- ☐ Of all the alternative approaches to the given regulatory objective, the proposed action will maximize the net benefits to society.
- ☐ The least-cost alternative is chosen.[47]

The executive order provides far less guidance for preparing and evaluating nonmajor rules. A nonmajor rule must be submitted to OMB ten days prior to its publication in the *Federal Register;* it must contain a discussion of the background and major issues involved, in order to satisfy *Administrative Procedure Act* requirements; and it must comply with general regulatory criteria established under EO 12291. Although these general criteria are less demanding than those prescribed for major rules, the OMB Director can reclassify nonmajor rules as major in order to bring more thorough analysis to bear on suspect regulations.

Agency submissions of both major and nonmajor rules, proposed or final, are subjected to a triple review process in OMB—by an OMB desk officer, by a budget examiner, and by staff from the Regulatory and Statistical Analysis Division. Progress is tracked by computer. Generally, reviewers determine that the need for regulation has been established, that alternatives have been considered, and that the benefits and costs have been compared wherever authorizing legislation permits.

Where issues have been raised by any of these reviews, as is estimated to have occurred in 20% of all submissions thus far, problems have been worked out informally according to an OMB official responsible for the review process.[48] This finding is not surprising since agencies are barred from publishing a preliminary Regulatory Impact Analysis or Notice of Proposed Rulemaking until OMB's review is concluded.[49] When issues are not raised, or once they have been resolved, OMB then notifies agencies to proceed with publication in the *Federal Register.* Although it has rarely occurred,[50] agency heads may choose in the end to disregard OMB suggestions for rule changes, in which case OMB can file its views with the agency as part of the rulemaking record. In one 1982 case, EPA did proceed to publish a set of regulations on toxic waste disposal without receiving OMB approval in order to comply with a federal court order.[51]

Program Performance

It is too early to fully evaluate the Reagan regulatory review process, but most observers agree the new Administration's program has been more successful than its predecessors in improving the efficiency of existing regulations and stemming the tide of new ones. Most of its success, however, can be attributed to OMB oversight, rather than to agency regulatory review effort.

One rough measure of success is *Federal Register* statistics for 1981, which show a substantial decrease in regulatory activity. The number of pages has fallen by one-third. The average monthly number of regulatory documents in the *Federal Register* was at its lowest level since such statistics were first tabulated in 1977. In 1980, for example, nearly 8,000 rules became final, compared to only 6,500 in 1981. The statistics for the review process are only slightly less impressive. OMB reviewed 2,913 proposed and final rules in 1981. Although data for major rules is incomplete, more than 150 rules were modified and 115 others were returned to agencies or withdrawn (see *Table 6–1*). Still, of approximately 40 major rules acted upon by the Reagan Administration in 1981, only 19 had regulatory impact analyses prepared for them.[52] Moreover, because there have been few surveys of the beneficiaries of this regulatory relief, the extent to which the process specifically has aided state and local government is largely unknown.

Several factors have made the new review process more effective than earlier programs. The regulatory review requirements themselves, which are only marginally different from past procedures, are not regarded as important contributing factors.[53] Rather, the unprecedented centralization of power in OMB, together with the vastly strengthened commitment of key personnel to a real reduction in the regulatory burden, appear to be crucial.[54] Apparently, agencies now recognize they must "thread the eye of the needle" in order to have their regulations approved, and passage is by no means assured. On the other hand, OMB review has been criticized by the General Accounting Office for failing to make its comments on agency analyses available to the public, for granting excessive waivers from regulatory analysis, and for failing to take steps to improve agency analyses.[55] In a recent book on regulatory reform, Fred Thompson and L.R. Jones echo this last criticism of OMB. They also suggest that the new executive order will exacerbate regulatory delay, estimating that it adds "at least 90 days" to the Carter regulatory review process.[56]

INSTITUTIONALIZING REGULATORY REVIEW: RECENT LEGISLATIVE PROPOSALS

Because all of the regulatory review and oversight programs—from President Ford's to

Table 6–1

Disposition of Regulations Reviewed by OMB Under E.O. 12291, 1981

	All New Rules		Major New Rules		Frozen Rules[a]	
	No.	Percent	No.	Percent	No.	Percent
Approved as Submitted	2446	(91%)			112	(65%)
Approved After Minor Changes[b]	138	(5%)	60[c]	(97%)		
Approved After Substantial Amendment					12	(7%)
Returned Unapproved	45	(2%)	1	(1%)		
Withdrawn[d]	50	(2%)	1	(1%)	18	(10%)
Still Pending					30[e]	(17%)
Total	2679[f]	(100%)	62[g]	(100 %)	172	(100%)[h]

[a] Presidential Memorandum of January 29, 1981, "froze" all rules' effective dates for 60 days.
[b] "Minor changes" typically involved clarifications in the preamble to the *Federal Register* notice rather than substantive changes to the rule.
[c] No data are provided identifying the number of major rules approved as submitted, after minor changes, or after substantial changes.
[d] i.e., withdrawn by the agency before review by OMB was completed.
[e] As of April 23, 1982.
[f] A total of 2,803 rules were submitted to OMB for review, but 124 were exempt or improperly submitted and therefore not reviewed.
[g] While 62 major rules were submitted to OMB for review, only 43 were published in 1981.
[h] Percentages may not add to 100% because of rounding.

Source: U.S. General Accounting Office, *Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulation* (Washington, DC: U.S. Government Printing Office, 1982), pp. 48, 49.

President Reagan's—have been undertaken by executive order, their existence and continuation have depended on presidential discretion. Legislation currently before Congress would alter this situation by, among other things, strengthening and clarifying statutory authority for presidential oversight rulemaking and by instituionalizing regulatory review and clearance procedures. Such provisions, contained in the "Regulatory Reform Act of 1982" (S1080), have already passed the Senate, and companion legislation (HR 746) is before the House.

These bills parallel EO 12291 by providing for agency regulatory analysis of major rules and for routine procedures of presidential oversight. As under current procedures, for example, the Executive Office of the President would have up to 60 days for reviewing proposed and final major rules. However, an important change under the proposed legislation would expand regulatory review procedures to include independent regulatory commissions in addition to line agencies.

BUDGETING AS A MEANS OF CONTROLLING REGULATION

While the regulatory analysis program has improved the President's oversight capacity, the most comprehensive executive procedure for controlling the content and extent of regulation is a budgetary mechanism. Budgeting always has been viewed as a process for systematically relating the expenditure of funds to the accomplishment of planned objectives. Thus, it also serves management and control functions.[57]

Recently, proposals have emerged calling for the extension of budgetary procedures to the costs imposed by federal rules and regulations, and the seeds of such a procedure are contained in EO 12291. Ideally such a regulatory budget would force choices among regulatory objectives and help control the growth of regulatory burdens. Indeed, among all procedural approaches to reform, the regulatory budget would go the farthest toward restructuring the incentives bureaucrats face in regulatory policymaking. Under such a budget, agencies would be forced to reconcile their regulatory proclivities with the costs that rules impose. Moreover, they would do so within prescribed budget ceilings. Insights into how such a system might actually operate, and some of the difficulties likely to be encountered, can be gleaned from experience with the federal paperwork budget.

The Federal Paperwork Budget

In 1977, a budgetary approach was established to control federal paperwork requirements. This system was a response to rapidly growing federal paperwork requirements in the 1970s. Although the federal government has legitimate information needs, the cumulative burden of these requirements can be enormous. According to the Commission on Federal Paperwork, the federal government had about 5,000 reporting requirements in 1976 to which businesses, recipients of federal aid, and individuals spent an estimated 768 million hours a year responding.[58] Many of these requirements were found to be duplicative, unnecessary or unreasonably burdensome.

Assessing the impact of federally induced paperwork on state and local governments specifically, the Federal Paperwork Commission concluded that the paperwork costs of federal assistance programs averaged between 5% and 7% of total program outlays. Using the lower estimate of 5%, these intergovernmental costs exceeded $5 billion in 1976, not including those expenses passed on to other governments, private businesses, or citizens.[59] Accordingly, the commission recommended that stronger central clearance, review and coordination procedures be adopted to control federal paperwork requirements, along with hundreds of additional specific suggestions for paperwork reduction.[60]

Spurred by such findings and recommendations, the Carter Administration first sought to bring paperwork requirements under control by utilizing the *1942 Federal Reports Act* which, as amended, directed agencies to obtain paperwork clearance from OMB and authorized OMB to make changes in agency submissions. OMB used this power to cut paperwork governmentwide by 15% between 1976 and 1978.[61] Thereafter, stronger action was taken. President Carter issued EO 12174 in November 1979, creating the first paperwork budget.

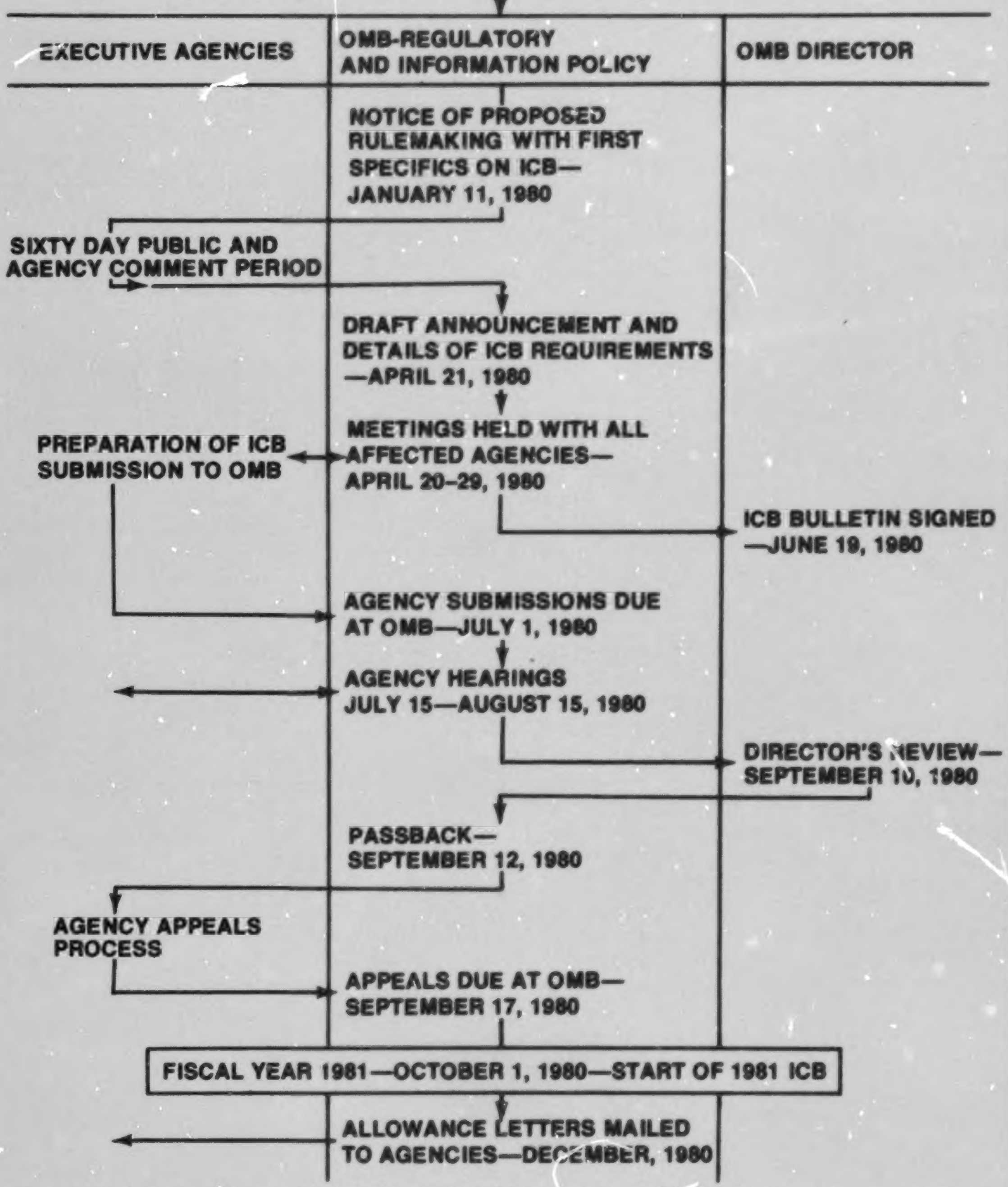
How the Paperwork Budget Works. The "Information Collection Budget" (ICB) is designed to work like an expenditure budget—except that OMB, not Congress, makes the final decisions.[62] (*Chart 6–1* illustrates the ICB cycle.) In practice, each agency lists for OMB all the forms it expects to use in the next fiscal year and estimates the manhour burden required for their completion. "Budget" hearings then are held and, should OMB choose, it can make cuts. Agencies, of course, may appeal such cuts to OMB's Director or, theoretically, to the President. The final information budget prescribes ceilings for each agency and mandates cutting back or eliminating individual forms.

Instead of the ad hoc, case-by-case approach utilized by OMB under the *Federal Reports Act*, the ICB is a planning and budgeting approach to controlling paperwork. Its advocates argue that it:

- ▫ provides a rational basis for setting overall control totals for government paperwork;
- ▫ extends control over executive branch paperwork beyond the approximately 20% previously approved on a form-by-form *Federal Reports Act* review;
- ▫ encourages agencies and OMB to treat reporting and recordkeeping policies as resource allocation decisions; and,
- ▫ allocates available OMB resources to solving major paperwork problems rather than spreading them with less effect across ad hoc reviews of individual forms.

Chart 6–1

1981 Information Collection Budget Process


EXECUTIVE AGENCIES
OMB-REGULATORY AND INFORMATION POLICY
OMB DIRECTOR
NOTICE OF PROPOSED RULEMAKING WITH FIRST SPECIFICS ON ICB—JANUARY 11, 1980
SIXTY DAY PUBLIC AND AGENCY COMMENT PERIOD
DRAFT ANNOUNCEMENT AND DETAILS OF ICB REQUIREMENTS —APRIL 21, 1980
PREPARATION OF ICB SUBMISSION TO OMB
MEETINGS HELD WITH ALL AFFECTED AGENCIES—APRIL 20–29, 1980
ICB BULLETIN SIGNED —JUNE 19, 1980
AGENCY SUBMISSIONS DUE AT OMB—JULY 1, 1980
AGENCY HEARINGS JULY 15—AUGUST 15, 1980
DIRECTOR'S REVIEW—SEPTEMBER 10, 1980
PASSBACK—SEPTEMBER 12, 1980
AGENCY APPEALS PROCESS
APPEALS DUE AT OMB—SEPTEMBER 17, 1980
FISCAL YEAR 1981—OCTOBER 1, 1980—START OF 1981 ICB
ALLOWANCE LETTERS MAILED TO AGENCIES—DECEMBER, 1980

Source: Office of Management and Budget, *Information Collection Budget of the United States Government: Fiscal Year 1981* (Washington, DC: Office of Management and Budget, 1981).

The principles of the executive order establishing the ICB, together with requirements contained in its implementing OMB bulletin, were "folded into" the *Paperwork Reduction Act of 1980*, a Carter-sponsored piece of legislation primarily shepherded through Congress by Sen. Lawton Chiles (D-FL) and Rep. Jack Brooks (D-TX).[63] The act augments the OMB Director's authority in a number of ways. Perhaps most far-reaching is the enhanced clearinghouse authority provided in Section 3508. Before approving a proposed information collection request, the OMB Director must determine whether such action is necessary for the agencies' functioning. To the extent, if any, that the Director determines the collection of information by the agency is unnecessary for any reason, the agency may not engage in the practice. The *Paperwork Reduction Act* also extended OMB's paperwork control responsibilities to agencies excluded from the *Federal Reports Act of 1942*.

The Information Collection Budget is still in its infancy. Consequently, the early budget cycles have encountered some difficulties. In the first round in 1980, instructions were not issued to agencies until two weeks before the first submissions under the budget were required from them. During the 1981 budget cycle, instructions came out three weeks prior to the deadline. But to give agencies more time, OMB decided to extend the second year's due date for the budget materials by an extra month. Thus, in both years inadequate time was allowed for analysis and preparation of materials. In addition, many agencies lack adequate staff support for successful implementation. Nevertheless, OMB has reported progress in the ICB process. FY 1981 paperwork burdens were decreased by nine percent for the agencies under OMB control while burdens imposed by agencies not under OMB control rose by 2%.[64] By 1982, OMB estimated that paperwork burdens had been reduced 17% below 1980 levels. Although much of this reduction focused on the nongovernmental sector, significant reductions accrued to state and local governments in certain areas because of recent block grant legislation.[65]

8

Regulatory Budgeting

Apart from limited experience with the paperwork budget, full scale regulatory budgeting remained a theory until President Reagan issued EO 12291. Section 6(a)(6) of the order directs the Presidential Task Force on Regulatory Relief, in conjunction with OMB, to "develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for the purposes of compiling a regulatory budget."[66] Although implementing a regulatory budget remains in the future, EO 12291 brings it one step closer to reality. Yet, to be effective, regulatory budgeting will have to ensure that the kinds of information needed to make better decisions are available at the right point in the budget cycle.

How a Regulatory Budget Would Work. Though regulatory budget proposals differ, most would likely adhere to the following general cycle.[67] The process would operate parallel to and as a component of the existing budget cycle. Regulatory budget estimates and proposals would be prepared according to guidelines issued by OMB. Agencies would prepare proposals to continue existing regulations and would request authorization of expenditures for the new proposals.[68] Agency budget submissions would include descriptions of current and proposed regulatory activities, justifying statements for new proposals, and current as well as proposed expenditures for agency administrative costs.[69] Undoubtedly, they would incorporate some form of regulatory economic analysis as well. Finally, agency submissions to OMB would have to include statements of current private (and possibly subnational governments') compliance activities and their costs, estimates of budget year costs under existing regulatory obligational authority, and estimates of proposed increments.

A major advantage of the regulatory budget is that, unlike the regulatory analysis and review program, it would be integrated into the established agency decision process—the budget cycle.[70] Yet, even its proponents point out that a number of critical issues must still be worked out before a regulatory budget becomes feasible.[71] These include: methods of budget preparation; techniques for estimating private sector and state and local compliance costs; and provision of federal incentives to reduce such costs. Indeed, the data requirements are so imposing that many have questioned whether reliable estimates of the regulatory costs for both private and public sectors can be produced. Some critics have further charged that the procedure might lead to an overemphasis on regulatory benefits. They fear that hard-to-measure costs might be underemphasized in decisionmaking,[73] and compliance costs could be "rigged" by regulators and by the regulated.

Overall, experts on regulatory budgeting expect no panacea. The process would not prevent the Executive and Congress from giving greater attention to some costs than to others (i.e., administrative costs versus compliance costs and compliance costs versus user costs). It would be less useful for some kinds of costs than others (i.e., direct versus indirect costs), especially those that are less easily measured. Still, it would raise the 'regulatory consciousness" of agencies and focus unprecedented public attention on federal regulatory decisions.

CONCLUSIONS ON EXECUTIVE BRANCH REGULATORY REVIEW EFFORTS

Presidential and executive branch efforts to establish authority over agency regulatory activity clearly are not new. Some form of review is at least as old as the "quality of life" review established during the Nixon years, and full scale agency regulatory review dates from the Ford Administration. Thus, the process established by President Reagan under EO 12291 is best understood as building on nearly ten years of experience with presidential regulatory review and oversight.

Still, the current program departs in important ways from its predecessors. First and foremost, oversight of all executive branch proposed rulemaking now has been placed squarely in the Executive Office of the President—in the OMB's Office of Information and Regulatory Affairs—instead of in an interagency committee where it had been in the past. Second, the program takes immediate action on existing rules. The President's Task Force on Regulatory Relief, discussed in detail later in this chapter, has been created to review the economy and efficiency of existing rules in order to *reverse* the tide of regulation rather than simply *stem* it. Finally, the Preisdent has put his personality and authority behind the regulatory relief effort in an unprecedented manner, and he has used his personnel powers at the highest levels of OMB and the regulatory bureaucracy to infuse a new spirit of regulatory skepticism among top and mid-level executive branch managers.

It is difficult to draw conclusions about the long-term effects of a process that is only two years old. In the short term, all agree it has borne some fruit. Some believe the accomplishments have been remarkable considering the obstacles of bureaucratic enertia and resistance to change. Others are less sanguine, believing regulatory reform has moved too slowly or too fast.

Some critics fear that long-term benefits may be jeopardized because the process does not have a statutory basis and because review and oversight are less systematic than they should be. These weaknesses have led some experts to advocate additional procedural review mechanisms in the executive branch. One, the proposed "Regulatory Reform Act of 1982," would give the process a statutory basis. Other proposals would establish a regulatory budget process.

Finally, some regulatory reformers prefer a different set of alternatives altogether. They contend that new processes for improving regulatory efficiency have overlooked other standards by which regulatory reform must be judged—particularly the extent to which the regulatory process is accountable to the public directly and to the Congress. It is to Congress' role in providing greater accountability, through reforms increasing its oversight of agency rulemaking and improving its information about potential regulatory impacts, that this chapter turns next. Thereafter, consideration focuses upon federal initiatives designed to improve accountability to the general public and to increase state and local government participation in regulatory policymaking.

Legislative Regulatory Review and Oversight

The executive branch has not been alone in seeking ways to control and improve federal regulation. In recent years, Congress has endeavored to improve its oversight of the regulatory process and to improve regulatory policymaking. Although it has always had authority to shape regulations through legislation, growing Congressional dissatisfaction with agency rulemaking has encouraged Congress to involve itself in the administrative stage of regulation as well. One means of doing so has been the legislative veto, which requires that proposed regulations be submitted to Congress for review before they take effect. The number of programs subject to legislative veto has increased rapidly in recent years, including many intergovernmental regulations.

Congress has also begun responding to criticism of its own role in fostering regulatory growth by adopting new procedures intended to improve regulatory legislation. *Chapter 3* indicated that many recent intergovernmental regulations were enacted with minimal Congressional consideration of their fiscal impact on state and local governments. In order to obtain further information about potential effects of intergovernmental regulatory proposals, Congress enacted the *State and Local Cost Estimate Act of 1981*, requiring the Congressional Budget Office (CBO) to prepare cost estimates, or fiscal notes, that highlight their anticipated costs.

THE DEVELOPMENT AND GROWTH OF THE LEGISLATIVE VETO

Congressional oversight of the executive branch has long been recognized as an important legislative responsibility, but it has grown especially important in recent years as the complexity and scope of federal programs have increased. Unable to reach a consensus on the details of certain programs or to cope with their technical nature, Congress frequently has determined only the general outlines of policy, leaving much of the detailed substance to federal agencies. Nowhere has this tendency been more apparent than in regulation. In 1980, the House Rules Committee identified a disturbing congressional propensity to delegate excessive regulatory authority to executive agencies:

> Recent Congresses, either through a lack of discipline or as a result of a desire to develop a consensus, have continued to grant regulatory agencies broad and far reaching legislative authority with virtually no guidance for its implementation.[73]

In occupational safety, for example, Congress statutorily requires the Occupational Safety and Health Administration (OSHA) to develop regulations prescribing "conditions for the adoption or use of ... practices, means, methods, operations or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[74]

Traditionally, Congress has relied upon a variety of oversight techniques to monitor agency performance of delegated authority. It has the power to confirm Presidential appointments, to authorize appropriations, to conduct investigations and to perform casework. These traditional oversight powers have significant limitations, however. As James Sundquist explains:

> From the standpoint of Congress, the normal processes of Congressional oversight of administration have two fundamental limitations. First, they do not prevent maladministration. Oversight occurs usually after the fact; by the time the oversight hearing takes place, the administrative action has been taken. Second, except as it may lead eventually to new legislation, oversight produces only advice, not mandatory direction, to administrators; during or after oversight hearings, committees and individual legislators have no authority to issue directives to administrators telling them how to do their jobs. It is these twin shortcomings of oversight—too late and too weak—that have impelled the Congress ... to develop more timely and authoritative means of intervention in the administrative process.[75]

These limitations—together with dissatisfaction over the content of specific executive branch regulations—have prompted Congress to turn increasingly to yet another form of oversight: the legislative veto. As William Schafer and James Thurber define it, the legislative veto consists of:

> Statutory provisions by which Congress authorizes a federal program to be administered by the executive but retains the legal authority to disapprove all or part of the program before final implementation.[76]

Although there are many varieties of legislative vetoes, the most common forms are the one and two-house vetoes. In its strongest form, the one-house veto permits either legislative chamber to block executive branch regulations or decisions by passing a simple resolution of disapproval within a fixed period of time following the agency's action. A variation of this permits a one-house veto if the second chamber does not overturn the first's action within a specified period. The two-house veto may require passage of a concurrent resolution of disapproval by both chambers or, less intrusively, a joint resolution of Congress, which is accompanied by the President's signature.

Earliest use of the legislative veto dates to Congress' first delegation of reorganization authority to the President. The *Legislative Appropriation Act of 1932* granted President Hoover authority to reorganize executive branch departments and agencies, subject to Congressional disapproval. Similar authority was vested in President Roosevelt by the *Reorganization Act of 1939*, which has been extended periodically, with increasing limitations, since that time.[77]

Use of the legislative veto is becoming increasingly popular in Congress. Over 85 statutes with legislative veto provisions were enacted in the 1970s—33 in the 96th Congress alone.[78] Of these, nearly one-half involved intergovernmental programs, including pesticide regulations (FIFRA), coastal zone management, solid waste disposal and health planning (see *Figure 6–2*).

The legislative veto concept has been subject to extensive debate concerning its constitutionality and wisdom. Controversy has been especially heated in cases where the concept has been applied to federal regulations— including certain intergovernmental mandates. Advocates endorse the legislative veto because it allows Congress to delegate regulatory authority without relinquishing ultimate responsibility for policymaking, and they point to the *inadequacy of existing oversight techniques.*[79] Opponents, on the other hand, charge the legislative veto is ineffective, delays the rulemaking process, and intrudes upon executive prerogatives.[80]

Despite such controversy, support exists in Congress for an even stronger, "generic" form of legislative veto. Such a provision was included in "The Regulatory Reform Act of 1982" which passed the Senate by a vote of 94–0. Whereas existing forms of legislative veto have been attached to individual programs on a case-by-case basis, the generic version would make regulations implementing all or most federal programs subject to Congressional disapproval. Although the effect of this technique would extend far beyond the scope of this study, the mechanism clearly has potential to substantially affect intergovernmental regulation. Its final status is uncertain at this time, however, both in Congress and before the courts.[81]

FISCAL NOTES AND INTERGOVERNMENTAL REGULATION

Fiscal notes are another important legislative technique for controlling intergovernmental regulation. The process—established in 1981—attempts to instill a sense of legislative discipline and restraint by providing information to Congress about the costs imposed on state and local governments by proposed regulations.

In recent years, Congress has clearly been a principal source of new program initiatives.[82] Moreover, *Chapter 3* demonstrates that Congress often fails to carefully consider the intergovernmental impacts of new regulatory enactments. One reason for this failure appears to be the lack of timely and reliable information about the costs of new proposals.

Experience at the state level suggests that a fiscal notes process can improve this situation. A 1977 ACIR survey found that fiscal notes improved state-local relations and the quality of state legislative decisionmaking in 34 states utilizing them.[83] Accordingly, the Commission recommended that states expand their fiscal note processes to include all major state legislation and proposed administrative rules affecting local government revenues or expendi-

Figure 6–2

Congressional Veto Laws Enacted by the 96th Congress

	Act Number	Bill Number	Title	Date of Approval	Page in Report
1.	PL 96–22	S 7	*Veterans Health Care Amendments of 1979*	June 13, 1979	25, 41
2.	PL 96–60	HR 3363	*Department of State Authorization for 1980 and 1981*	Aug. 15, 1979	64
3.	PL 96–79	HR 4388	*Energy and Water Development Appropriations for Fiscal Year 1980*	Sept. 25, 1979	102
4.	PL 96–72	S 737	*Export Administration Act Amendments of 1979*	Sept. 29, 1979	60,93
5.	PL 96–74	HR4393	*Treasury, Postal Service and General Government Appropriations for Fiscal Year 1980*	Sept. 29, 1979	103
6.	PL 96–97	S 544	*Health Planning Amendments of 1979*	Oct. 4, 1979	54
7.	PL 96–88	HR 2444	*Department of Education Organization Act*	Oct. 17, 1979	49
8.	PL 96–102	S 1030	*Emergency Energy Conservation Act of 1979*	Nov. 5, 1979	80
9.	PL 96–122	S 1037	*District of Columbia Retirement Reform Act*	Nov. 17, 1979	83, 91
10.	PL 96–126	HR 4930	*Department of Interior and Related Appropriations Fiscal Year 1980*	Nov. 27, 1979	112
11.	PL 96–132	S 1157	*Department of Justice Authorization for Fiscal Year 1980*	Nov. 30, 1979	98
12.	PL 96–151	HR 3892	*Veterans' Administration Health Resources and Program Extension Act of 1979*	Dec. 20, 1979	84
13.	PL 96–187	HR 5010	*Federal Election Campaign Act Amendments of 1979*	Jan. 8, 1980	116
14.	PL 96–205	HR 3756	*United States Insular Areas Appropriations Authorization*	Mar. 12, 1980	82
15.	PL 96–223	HR 3919	*Crude Oil Windfall Profit Tax Act of 1980*	Apr. 2, 1980	86
16.	PL 96–230	HR 6585	*Extension of the Reorganization Authority of the President*	Apr. 18, 1980	139
17.	PL 96–247	HR 10	*Civil Rights of Institutionalized Persons Act*	May 23, 1980	25
18.	PL 96–252	HR 2313	*Federal Trade Commission Improvements Act of 1980*	May 28, 1980	45, 79, 127
19.	PL 96–294	S 932	*Energy Security Act*	June 30, 1980	89, 90
20.	PL 96–332	S 1140	*Marine Protection Research and Sanctuaries Act Authorization*	Aug. 29, 1980	94, 139
21.	PL 96–364	HR 3904	*Multiemployer Pension Plan Amendments Act of 1980*	Sept. 26, 1980	85
22.	PL 96–367	HR 7590	*Energy and Water Development Appropriations Act of 1981*	Oct. 1, 1980	160
23.	PL 96–374	HR 5192	*Education Amendments of 1980*	Oct. 3, 1980	118, 123
24.	PL 96–464	S 2622	*Coastal Zone Management Improvement Act of 1980*	Oct. 17, 1980	149, 151
25.	PL 96–482	S 1156	*Solid Waste Disposal Act Amendments of 1980*	Oct. 21, 1980	96
26.	PL 96–487	HR 39	*Alaska National Interest Conservation Act*	Dec. 2, 1980	26
27.	PL 96–510	HR 7020	*Comprehensive Environmental Response and Liability Act of 1980*	Dec. 11, 1980	109, 148
28.	PL 96–514	HR 7724	*Department of Interior and Related Agencies Appropriations, 1981*	Dec. 12, 1980	162
29.	PL 96–515	HR 5496	*National Historic Preservation Act Amendments of 1980*	Dec. 12, 1980	127
30.	PL 96–526	HR 7631	*Housing and Urban Development Appropriations, 1981*	Dec. 15, 1980	160
31.	PL 96–533	HR 6942	*International Security and Development Cooperation Act*	Dec. 16, 1980	142, 157
32.	PL 96–539	HR 7018	*Federal Insecticide, Fungicide and Rodenticide Act*	Dec. 17, 1980	146
33.	PL 96–592	S 1465	*Farm Control Act Amendments of 1980*	Dec. 24, 1980	108, 158

Source: U.S. Congress, *Congressional Record*, Daily Ed., 97th Cong., 2d Sess., March 23, 1982, p. S 2575.

tures. In 1980, convinced that fiscal notes could also be effective in restraining and rationalizing federal intergovernmental regulation, the ACIR recommended such a process be established at the national level as well:

> The Commission finds that federally mandating legislation often imposes unanticipated burdens and costs upon local governments. Hence....
>
> The Commission recommends that Congress amend the *Congressional Budget Act of 1974* to require the Congressional Budget Office (CBO), for every bill or resolution reported in the House or Senate, to prepare and submit an estimate of the costs which would be incurred by state and local governments in carrying out or complying with such a bill or resolution.[84]

This recommendation was implemented the following year when Congress enacted the *State and Local Cost Estimate Act of 1981.* Beginning in fiscal 1983, this act requires the Congressional Budget Office (CBO) to estimate the costs that state and local governments would incur by complying with proposed federal legislation. CBO is required to prepare cost estimates for every "significant" bill or resolution reported by committees in the House or Senate. "Significant" is statutorily defined as either having an aggregate impact of $200 million on state and local governments or having "exceptional fiscal consequences" on a particular region or government.

Supporters believe that fiscal notes will provide Congress with important information about anticipated costs of federal regulatory proposals for subnational governments. Moreover, it is believed that such a process will provide Congress with a means of assessing the cumulative effects of federally mandated financial obligations on these governments. This, in turn, may prompt the federal government to limit such intergovernmental costs.

On the other hand, skeptics have questioned the workability and effectiveness of the new process. They note that the task of developing timely and reliable estimates of anticipated costs will be a difficult one. Judging from the past, CBO has found that many bills are likely to require cost estimates (see *Table 6–2*). CBO has also found that needed information on state and local costs may vary widely depending on the nature and language of each piece of legislation. Many forms of costs are difficult to estimate or measure, and specific regulations and requirements will not exist at this stage in the regulatory process. Indeed, *Chapter 5* of this volume indicated that many difficulties are involved in accurately measuring the costs imposed by intergovernmental regulations even when a program is in operation. Finally, estimation problems may be exacerbated if little time is provided for analysis of bills before they are considered on the

Table 6–2

CBO Cost Estimates for Bills With Potential State and Local Fiscal Impacts

	1979	1980	1981
State and Local Impact			
Less than $100 million	67	54	28
$100–$200 million	22	16	21
$200 million and above	34	31	21
Exceptional state or local	20	43	14
Total	143	144	84

Source: Congressional Budget Office, *The Feasibility of Preparing State and Local Cost Estimates: A Report to the House Rules Committee on the State and Local Cost Estimates Act of 1981* (Washington, DC: Congressional Budget Office, November 1981), p. 9.

floor. Because fiscal notes are required only for bills reported from committee, potentially costly floor amendments will escape the process altogether. Nevertheless, CBO is making progress on developing a working fiscal notes process, and its reliability can be expected to improve with experience. In the final analysis, moreover, even rough approximations of anticipated regulatory costs will be more useful than none at all.

State and Local Participation in Rulemaking

A third procedural approach for improving the regulatory process and providing a measure of regulatory relief involves strengthening state and local participation in the rulemaking process. The evolution of the intergovernmental consultation process is the subject of this section.

Over the past decade, the history of state and local participation in federal rulemaking has come full circle. No special intergovernmental consultation mechanism existed in 1966. The following year, the Budget Bureau (now OMB) issued Circular A-85, requiring that federal agencies consult with state and local governments on rules expected to have an intergovernmental impact. In 1978, A–85 was replaced with a less formal, and less effective, mechanism established under EO 12044. The subsequent rescission of this order in 1981, and the failure to devise an alternative consultation process, terminated any special participation mechanisms for state and local governments.

Today, in the absence of a process such as A–85, subnational governments have no rights to participate in the regulatory process beyond those rights accorded to the public generally under the *Administrative Procedure Act*. The next section reviews these minimum rights.

THE ADMINISTRATIVE PROCEDURE ACT

Public participation in rulemaking has long been regarded as an important means of protecting democratic values in bureaucratic lawmaking. As summarized by the Administrative Conference of the United States:

> Public participation in rulemaking helps to assure wiser policy formulation than would otherwise be the case, and provides a means by which private parties can defend their interests against governmental rules they deem undesirable. The most important reason why such public participation is worthwhile is that it helps to elicit the information, facts and probabilities which are necessary to fair and intelligent action by those responsible for promulgating administrative rules. Involvement of the people in the formulation of rules is, therefore, an important goal which ought to be pursued as far as possible; but it must be reconciled with the undoubtedly important competing societal interests favoring the efficient, expeditious, effective and inexpensive conduct of our government affairs.[86]

The *Administrative Procedure Act* (APA) establishes the public's minimum legal rights in informal agency rulemaking, and according to the Senate Judiciary Committee, "for most of its life, [it] has worked relatively well."[87]

Specifically, section 4 of the APA sets out a flexible procedure for informal rulemaking by which most federal regulations are promulgated.[88] Unless otherwise specified by Congress, by the President, or by the act itself, agencies need only provide an opportunity for written public comment over a thirty day period. The "Notice and Comment" process begins with publication of a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* and ends with publication of the final rule. It applies equally to all public participation, including that of state and local governments which are accorded no special treatment under the act.

APA requirements have been broadened somewhat by a number of court cases. Now, notice of proposed rulemaking must provide a basis for informed comment by interested persons;[89] certain issues involved in informal rulemaking may require more than notice and document procedures; and, when a final rule is promulgated, it must be accompanied by a response to all significant public comments made during the comment period.[90]

RULEMAKING EXEMPT FROM APA PARTICIPATION REQUIREMENTS

While most rulemaking is prescribed by APA requirements, that which is related to grants, loans, benefits or contracts is not. This exemption is of particular concern to state and local governments, since much of the regulation that affects them falls into this category.

5 U.S.C. Section 533 (a)(2), which codifies Section 4 of the APA, is known as the "proprietary clause." It exempts rulemaking involving, among other things, matters "relating to agency management of personnel, or to public property, loans, grants, benefits or contracts" from all notice and comment requirements including those providing for public participation in rulemaking. As used in this section of the law, "grants" cover all subsidy programs and grant-in-aid programs under which the federal government makes payments to state and local governments.[91]

Though they are not required to do so, many agencies voluntarily have observed notice and comment procedures in their grant-related rulemakings. Moreover, from time to time, Congress has made provisions for public participation in individual grant programs of particular agencies. Nevertheless, the exemption has created substantial problems for state and local government participation in grant rulemaking overall. It means that while state and local governments are guaranteed participation in nongrant rulemakings, including those that are regulatory, they have no *legal* participation guarantees for grant and grant-related rulemakings. As a practical matter, there is often a great deal of communication about individual regulations between the levels of government. But, for grant regulations generally, communication is nearly always at the discretion of federal agency personnel, and it most often occurs on technical rather than policy matters. State and local governments regard the failure to provide them participation in grant rulemakings as a serious shortcoming, given their unique position in the federal system and their responsibilities for implementing grant programs.

Nor are state and local officials alone in their opinion. As early as 1969, the Administrative Conference concluded that these exemptions are "extraordinarily broad and of very great significance," adding that:

> The particular classes of rulemaking excluded by [the clause] are also of especially great qualitative importance to particular segments of our society, to the public at large, and to our national effort to cure the pressing human problems of the last half of the twentieth century. That is, most rulemaking excluded from section 553 by subsection (a)(2) relates to programs, or functions or techniques for governing, which have an unusually large impact on the daily lives of tens of millions of Americans. Efforts to solve our urban crisis, racial problems, poverty problems, environmental quality difficulties, and human spirit and character maladjustments as examples, have mainly been pursued through the use of "public" property,loans, grants, benefits or contracts.[92]

INSTITUTIONALIZING STATE AND LOCAL GOVERNMENT, PARTICIPATION IN RULEMAKING: OMB CIRCULAR A–85

In order to enhance state and local consultation in federal grant programs, Budget Circular A–85 ws promulgated in 1967. The circular was a response to state and local pressures for upgrading the administration of grant programs and for strengthening the resources of elected chief executives. As federal programs grew, these officials found that they were sometimes not aware of new program regulations until their governments became subject to them. Consequently, at the urging of Vice President Hubert Humphrey and Budget Director Charles Schultze, President Johnson issued a far-reaching executive order mandating consultation with state and local officials.[93]

As finally implemented, the circular set forth guidelines for federal agencies to use in determining which of their major agency regulations should be channeled through the consultation process. The process was intended to offer elected chief executives of state and local governments, through their national associations, the opportunity to review and comment upon major proposed federal regulations, rules, standards, procedures and guidelines related to grant administration, as well as organizational changes that significantly affected them. Whenever possible, the consultation was to take place early in the development of such actions. Responsibility for administering the process was vested in the Advisory Commission on Intergovernmental Relations. In its intermediary role, ACIR transmitted proposed regulations from federal agencies to the public interest groups and forwarded the latters' comments back to the agencies.

Despite its initial promise, public interest groups found A–85 less useful than anticipated, and they often failed to participate. A–85 was even less popular with federal agencies, and their lack of cooperation may have contributed to this tendency. Other problems with the process included failure of the public interest groups to respond in a timely manner, infrequent preconsultation with the public interest groups by the agencies, insufficient time for adequate response during the 30–day comment period accorded, and the widespread tendency of agencies to initiate the A–85 process simultaneously with public regulatory comment in the *Federal Register.*[94]

FACA AND THE RESCISSION OF A–85

The operational problems of A–85 were greatly exacerbated in 1976 by a broad judicial interpretation of the *Federal Advisory Committee Act* (FACA) which ultimately undermined the circular entirely.[95] Enacted by Congress in 1972, FACA was designed to eliminate unnecessary advisory committees, to improve the management of those that remained, and to inform the public about the membership and activities of such committees. Over time, however, this last objective threatened to conflict with A–85 consultations and eventually overwhelmed the process.

To fulfill FACA's requirement for public disclosure, advisory committees must adhere to the following stringent rules:

- ☐ Each advisory committee meeting shall be open to the public.
- ☐ Except when the President determines otherwise for reasons of national security, timely notice of each meeting shall be published in the *Federal Register*, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meetings prior thereto.
- ☐ Interested persons shall be permitted to attend, appear before or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.
- ☐ Subject to Section 552 of Title 5 of the U.S. Code, the records, reports, transcripts, minutes, appendixes, working papers, draft studies, agenda or other documents which are made available for public inspection and copying at a single location in the offices of the advisory committee or agency to which the advisory committee reports until the advisory committee ceases to exist.
- ☐ Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of persons present, complete an accurate description of matters discussed and conclusions reached, and copies of all reports received, issued or approved by the advisory committee.

Although the act is very clear about the procedures advisory committees must follow, it is distinctly unclear about what constitutes an advisory committee, what general classes of committees are excluded from coverage, and most important, what kinds of meetings are exempt. On each of these issues experts have disagreed considerably, and courts have delivered conflicting opinions.[96]

The act defines advisory committee as any committee, subcommittee, council, conference, panel or task force established by statute or reorganization plan or utilized by the President or agencies in the interest of obtaining advice.[97] Exemption is given to the Advisory Commission on Intergovernmental Relations, to civic groups and to groups of a wholly state or local government advisory nature.[98]

A narrow judicial interpretation of the scope of this exemption ultimately undermined state and local consultation through the A–85 process. In 1976, the Court of Appeals for the District of Columbia held that national organizations of state and local government officials were not exempt from FACA if they were utilized to advise federal agencies.[99] Accordingly, the court upheld the right of a nonprofit group, the Center for Auto Safety, to attend meetings between the American Association of State Highway and Transportation Officials (AASHTO) and the Federal Highway Administration. Rather than comply with FACA's burdensome public notice and participation requirements, state officials subsequently altered their advisory relationship with federal officials.

The AASHTO decision provided a legal basis for dismantling A–85. Many agencies disliked the A–85 process and long had argued that FACA superseded it. The AASHTO case gave new credibility to this interpretation and, in 1977, OMB held that A–85 consultations were not exempt from FACA. It was the OMB general counsel's view that the six public interest groups listed in Section 5(b) of Circular A–85 could not be construed as "civic" groups for FACA purposes, nor could they be considered to fall within the classifications for state and local advisory bodies. The counsel stated, "Each of these organizations is national in scope, presumably concerned not only with problems found on a state or local level but also with those which are a result of federal programs."[100]

At the same time, OMB began to challenge A–85's application to non-grant programs. The statutory authority for Circular A–85 was the *Intergovernmental Cooperation Act of 1968* (ICA). This act—among other things—provides for consultation related to federal or federally assisted development programs, but it does not mention nongrant programs. Perhaps because of confusion over the distinction between different kinds of rules, public interest groups routinely utilized the provisions of A–85 for all consultations. Yet some federal agencies argued that A–85 could not be applied to nongrant regulatory programs such as those of the Equal Employment Opportunity Commission or the Occupational Safety and Health Administration, even though the circular made no distinctions between consultation in grant rulemaking and other rulemaking. Unlike grants, the latter area was already covered under the APA, and A–85 was providing opportunities for consultation beyond the APA. Arguing against the continued OMB acceptance of this practice, a memorandum by OMB General Counsel William Nichols concluded that "the [*Intergovernmental Cooperation*] Act does not extend that [intergovernmental consultation] requirement to nonassistance regulatory programs and will not support the application of A–85 to such programs."[101] He added that, "It is our opinion ... that to the extent that A–85 applies to programs other than those identified in Section 401(b) of the *Intergovernmental Cooperation Act* [these being financial in nature], it has exceeded the authority granted under the act."[102]

OMB's critical interpretations of A–85's legal status were controversial. Although they sought improvements in the A–85 process, both the public interest groups and the ACIR supported a vigorous and comprehensive process of intergovernmental consultation. Moreover, it was argued that the ruling in the AASHTO case was balanced by another federal court decision in *Consumer Union of U.S., Inc. v. Department of HEW.*[103] This decision held that meetings in which federal officials explain national policies to others were not subject to FACA because they were not advisory. To the extent that A–85 was intended to inform state and local officials of federal decisions, this ruling appeared to exempt the process from FACA coverage. Despite these objections, however, OMB views carried the day. In 1978, Circular A–85 was rescinded and replaced by a less formal decentralized consultation process under President Carter's EO 12044.[104]

CONSULTATION AND PARTICIPATION IN RULEMAKING UNDER EO 12044

Although nothing in EO 12044 referred specifically to state and local participation in agency rulemaking, an accompanying presidential memorandum to federal agency heads did. According to this 1978 memorandum, the new process was to "assure full state and local participation in the development and promulgation of federal regulations with significant intergovernmental impact."[105] To help implement a decentralized consultation process, President Carter asked the seven national organizations representing general purpose state and local governments to review systematically the semi-annual regulatory agendas that EO 12044 required to be published in the *Federal Register* by each executive department and agency.[106] Where these organizations believed that a regulation included on an agency regulatory agenda would have major intergovernmental significance, the organization was to notify certain senior intergovernmental officials within individual agencies.[107] Upon receipt of such notification, the memorandum required that agencies develop a specific plan for consultation with state and local governments in developing that regulation. This consultation was to include solicitation of comments from these groups, from other representative organizations, and from individual state and local governments as appropriate.

In addition, President Carter already had required that whenever rules having major intergovernmental significance were submitted to OMB for review or were published in the *Federal Register*, those proposed regulations were to be accompanied by a brief description of how state and local governments were consulted, what the nature of state and local comments was, and what steps were taken by the agency to deal with these comments.

Continuing Problems Under EO 12044

Unfortunately, the executive order and accompanying memorandum made the consultation process less formal than A–85 without solving its fundamental problems. Federal agencies still contended that required contacts were in conflict with the provisions of FACA. Thus, during the period in which the executive order was in effect, agencies continued either to disregard the memorandum altogether or to implement its requirements haphazardly.

Consequently, an OMB evaluation of Carter Administration regulatory reform efforts noted that FACA, contrary to its intentions, tended to limit public participation generally and state and local government participation in particular.[108] The report noted complaints that FACA inhibits federal agencies from giving state and local interest groups an early and meaningful opportunity to participate in the development of agency regulations, as mandated by EO 12044.[109] OMB concluded that there was 'tension between FACA's formal requirements, which structure federal agency contacts with the public, and the call in EO 12044 for federal agencies to consult more often with state and local governments."[110] Without such consultation, the report conjectured, an important resource for effective regulatory policymaking could be lost.

REAGAN ADMINISTRATION RESCISSION OF EO 12044: A RETURN TO THE PAST

On February 17, 1981, President Reagan issued EO 12291, revoking President Carter's regulatory reform order, EO 12044. With that rescission, the new Administration terminated the aforementioned informal and decentralized consultation process which the Carter Administration had substituted for the A–85 process, effectively returning state and local governments to a position they regarded as unsatisfactory in 1967. Currently, there is no special mechanism for state and local consultation. Returning to the situation that existed prior to the promuglation of A–85 has meant that for grant regulations, no mandated participation avenues exist due to the exemption of grants in spite of the proliferation of grant-related requirements since 1967. Moreover, for nongrant rulemaking, state and local governments are now accorded the same privileges accorded the general public—no more, no less.

CONGRESSIONAL REFORMS RELATED TO PUBLIC PARTICIPATION

Some of the most promising reforms relating to public participation generally, and improved consultation procedures for state and local governments particularly, are contained in the recently passed S1080, "The Regulatory Reform Act of 1982" sponsored by Senator Paul Laxalt (R-NV). As summarized in the Judiciary Committee report of the bill, S1080 is the most recent product of nearly 17 years of work in the Senate on issues related to the process by which rules are promulgated and enforced pursuant to the *Administrative Procedure Act*.

As early as 1964, the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure began hearings on the APA.[111] Regulatory policymaking continued to be the object of Congressional probing in the 89th, [112] 94th,[113] and 95th Congresses.[114] During the 96th Congress, the Senate Subcommittee on Administrative Practice and Procedure held ten days of hearings on many forms of regulatory reform.[115] In addition, the Senate Committee on Governmental Affairs devoted six years to an extensive study of federal regulation, and in the 96th Congress it held 11 days of hearings on possible reforms.[116] In 1980, both the Senate Judiciary and Governmental Affairs Committees reported regulatory reform legislation, but Congress adjourned before their differences could be reconciled.

In the first session of the 97th Congress, the new Subcommittee on Regulatory Reform was given jurisdiction over the *Administrative Procedure Act*. This subcommittee took the lead in regulatory reform in the Senate, resulting in the recent passage of S 1060. This bill would substitute new language for Section 553(a) (1–4) of the APA and would remove the exemption for grant-in-aid rulemaking from notice and comment requirements. This change is highly significant becasue it would establish minimum legal rights for state and local governments in the area of grant and grant-related agency regulatory decisions.

For the first time, the Notice of Proposed Rulemaking (NPRM) would be required to contain a statement that the agency sought proposals from the public (including state and local governments) for alternative regulatory methods, including the use of performance standards, to accomplish the objectives of the proposed rule as effectively and unintrusively as possible. This notification requirement provides state and local governments with the opportunity to propose alternative, more acceptable means of regulation.[117] Moreover, under the requirements of the bill, an NPRM must contain a statement requesting comments from state and local governments on the costs that will result to such governments from the proposed rule.[118] This requirement, in combination with newly enacted fiscal note legislation discussed earlier, will provide state and local governments an opportunity to check Congressional Budget Office cost estimates against their own.

The bill also addresses the problems FACA created for intergovernmental consultation, especially during the early stages of agency rulemaking. As passed, S 1080 incorporates an amendment exempting state and local governments from FACA's requirements. Originally offered by Senators Durenberger and Sasser, this amendment exempts from FACA's requirements any committee composed wholly of full-time officers, employees of the federal government, or elected officials of state or local governments when acting in their official capacities. It also exempts representatives of their national organizations.

S 1080 also revises procedures which agencies must use following publication of a proposed rule. Taken together, the reforms contained in the bill envision a "hybridized" rulemaking process. Such reforms have earned this designation because, as a group, they combine some aspects of the more adversarial, formal rulemaking procedures set out in sections 556 and 557 of the APA with the informal rulemaking procedures of Section 553.

Since 1975, Congress has mandated that certain agencies use hybrid participation procedures to enhance public participation beyond that provided by notice and comment procedures. As reported by Paul Verkuil, four variations[119] of this theme are found in the *Federal Trade Commission Amendments of 1975,*[120] the *Securities and Exchange Commission Amendments of 1975,*[121] the *Toxic Substances Control Act of 1976,*[122] and the *Department of Energy Organization Act of 1977.*[123] These statutes contemplate an oral hearing with cross examination as part of the rulemaking process. They reject APA informal rulemaking, but do not go so far as to require formal rulemaking.

S1080 significantly expands current hybrid provisions and creates new ones. In the case of major rules, the opportunity to participate includes an opportunity for oral presentation of data, views, and information at informal public hearings. Such oral presentations may include oral argument plus direct and cross examination. This process substiutes, for major rules, a hybridized rulemaking procedure for the current notice and comment procedures. In explaining the rationale for this change, the Senate Judiciary Committee report commented with particular emphasis on state and local governments:

> This reflects the committee's views that the policy, legal and factual issues involved in major rulemakings are sufficiently important and complex that interested parties should be given the opportunity to offer their comment orally. Furthermore, the committee intends that state and local governments—levels of government often severely affected by federal regulatory requirements—have, through this provision, the opportunity to participate fully in the rulemaking and therefore have a hand in shaping the rule.[124]

The bill also expands the period of public comment by giving interested persons not less than 60 days to participate in rulemaking through the submission of written data, views, arguments and statements. Existing law provides no minimum comment period. The new 60-day requirement, however, is in accord with the practices of many agencies. It also is consistent with the minimum comment period specified for significant rules under EO 12044. The Senate Judiciary Committee report concluded that, given the complexity of many issues involved in agency rulemakings, a 60-day comment period is necessary.[125]

Finally, the bill would negate the current presumption of agency validity in the judicial review of agency rules by requiring that, in making determinations of the lawfulness of agency actions, the "court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

* * * * * * *

This section has reviewed executive branch and Congressional reforms related to public participation in rulemaking. Overall it has shown that:

- The record of the executive branch in recent years has been one of rescinding past reforms, revealing declining interest in promoting participation generally and in recognizing the unique position of state and local governments in the federal regulatory system;
- Congress, on the other hand, has very recently sought to enact reforms of substantial importance to state and local governments, both through the removal of obstacles to state and local governments' consultation in rulemaking and through reforms that enhance opportunities for the public generally, which also can be expected to benefit state and local governments.

The next section examines a final procedural approach by which the federal government has sought to improve its management of intergovernmental regulatory policymaking and implementation. It traces federal initiatives to standardize agency regulatory practices as a means of reducing mandate burdens.

Standardizing and Coordinating Regulatory Requirements

While it is true that all procedural reforms potentially affect the substance of regulations because they alter the incentives decisionmakers face in the regulatory process, in some cases the linkages between process and substance are closer than in others. The reforms described in this section are those that would simplify particular regulations or groups of regulations by bringing greater uniformity to agency regulatory administration and implementation—a standardization approach. Hence, they are more directly connected to the substance of regulation than most of the procedural reforms described thus far.

Historically, the federal government often has sought to simplify state and local governments' compliance with federal rules by standardizing similar requirements imposed upon them by different federal agencies. Early efforts, inaugurated during the Johnson and Nixon years, addressed problems resulting from the first and most traditional form of federal intergovernmental regulation—grant conditions. Prominent among such reforms were OMB Circular A–102, which provided for uniform administration of certain grant-related administrative requirements, and the *Joint Funding Simplification Act*, which authorized grant recipients to "package" funds from related, small grants to pursue a single, larger project.

Similar efforts continued during the Carter Administration. The Regulatory Council, established in 1978, was assigned resonsibility for combatting duplication, conflict and overlap in regulation. An innovative by-product of its efforts was the creation of the *Calendar of Federal Regulations* that provided a semi-annual guide to the major planned or ongoing regulatory activities of federal agencies. During this period, OMB also developed, in draft form, a circular aimed at standardizing agency administration of some 59 federal crosscutting grant regulations, such as those for historic preservation, civil rights and uniform relocation.

While the Reagan Administration has shown a preference for less traditional mechanisms, some of these programs have continued and a new one—a regulatory management information system—is being added. Each of these programs—from those of President Carter through the most recent ones of President Reagan—is described below.

EARLY GRANTS MANAGEMENT STANDARDIZATION

Early federal standardization initiatives focused on problems associated with the federal grant-in-aid system. Of these, Circular A–102 was one of the first and most lasting. A second surviving initiative is the joint funding simplification program, designed to package related grant programs so that grant recipients may pursue single large undertakings with less red tape.

OMB Circular A–102

Office of Management and Budget Circular A–102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments," was issued on October 19, 1971, to implement portions of the *Intergovernmental Cooperaton Act of 1968* and to replace varying and sometimes conflicting federal aid requirements that had been burdensome to state and local governments. While it continued a tradition of earlier grants management reform efforts, the circular was a landmark reform, painstakingly formulated under the Nixon Administration's Federal Assistance Review (FAR) program. The A–102 program was designed to standardize and simplify a range of fiscal and administrative requirements placed on state and local governments. It has been guided by the following objectives:

- establishing standard administrative requirements for federal grants to state and local governments;
- simplifying federal requirements by designating the lowest common denominator that would satisfy the information needs of all agencies;
- reducing the number of pages, number of copies, and frequency of federal grant forms; and,
- emphasizing program performance rather than fiscal control, through the limitation of federal agency information gathering.[126]

In keeping with these principles, it attempts to standardize 15 areas of grants administration, including requirements for: application forms; grant payments; matching shares; cash depositories; procurement standards; property management; bonding and insuring; program income; financial reports; program performance monitoring and reporting; record retention and custody; single state agency waiver and grant closeout procedures. By setting uniform standards, A–102 also sought to restrain agencies from imposing excessive requirements on state and local governments.

Since its promulgation, implementation responsibility has shifted twice. From 1971 to 1974 it was administered by OMB as A–102; then, for two years it was the responsibility of GSA where it was administered as FMC 74–7. In 1976, it was returned to OMB where responsibility still rests. During the past decade, A–102 has established a record of successes, but it also has suffered from numerous implementation problems. One of the major continuing difficulties has been the failure of agencies to comply fully with the provisions of the circular. In reporting on the program, the National Governors' Association suggested that agencies often sought to be treated as "special cases" so they would be free to develop their own program-specific administrative requirements:

> In OMB Circular A–102, the federal government has promulgated a set of standards for the auditing and financial management of grant funds. However, many agencies and programs supplement these standards with additional unique and largely uncoordinated requirements. These requirements include audit provisions, recordkeeping and reporting. They also include special provisions for the receipt and forwarding of federal funds and establish separate procedures for the review and processing of federal disallowances. Compliance reviews and audits are often duplicative and are not required to build upon existing state audit procedures. Despite recent policy issuance by OMB, implementation of audit reforms by the federal inspectors general has been minimal.
>
> Existing federal standards are not uniformly applied or interpreted. Individual agency regulations often impose additional accounting, auditing and reporting requirements that are unnecessary, conflicting, and duplicative. These requirements inhibit the developement of uniform state procedures, waste limited state audit capacity, and provide substantial duplicate effort across federal agency lines. Valuable staff and financial resources are diverted from the development of comprehensive management information systems to short-term, limited-use systems to meet individual federal agency demands. In addition, audit requirements are costly for small grantees and sub-grantees to meet.[127]

In 1976, ACIR recommended that A–102 be strengthened and expanded to include additional administrative requirements. Three years later, based on findings contained in its report, *Fiscal Management of Federal Pass-Through Grants*,[128] the Commission again recommended that OMB improve its A–102 staffing and oversight and that federal departments improve their staffing and appreciation of A–102 as well.

The major public interest groups also have made their own recommendations for improving the operation of A–102. The National League of Cities, the National Association of Counties, and the National Governors' Association have recommended strengthening and more fully implementing A–102 as part of their individual responses in 1981 to requests for submissions to the President's Task Force on Regulatory Relief. NACO recommended that Congress and the Administration require all agencies to comply with federal government regulations which call for standardization and simplification of grant applications, procedures, and recovery of direct and indirect costs, and the National Governors' Association also has called for reforms to improve compliance.

Joint Funding

The *Joint Funding Simplification Act*, signed into law in 1974 and extended in 1981, was intended to increase the efficiency and effectiveness of the federal grant system by permitting the use of more simplified and uniform administrative rules and procedures under certain circumstances. Normally, when a state or local government develops a multipurpose project drawing funds from two or more assistance programs, it must file separate applications for each of the programs included in the project. Moreover, the administrative rules and procedures for processing these applications often differ substantially among different programs and agencies. The act attempts to alleviate this difficulty by providing authority to expedite the consideration and approval of such projects and by simplifying procedures for their administration after approval.

The act provides legislative authority for a program first begun as a demonstration by HUD in 1969 and expanded as the Integrated Grants Administration Program (IGA). By one count, as of December 1974, 24 IGA projects were underway involving over $33 million in federal funds. An evaluation of the IGA program in 1974 revealed several defects, including a lack of clear authority, reluctant federal regional council participation, staff limitations and turnover, and difficulties in decentralizing federal agency decisionmaking. Perhaps the greatest problem, however, was the tremendous amount of energy required by grant recipients to develop a joint project and to convince reluctant federal bureaucrats that it would be worthwhile. Despite such limitations, however, the program demonstrated sufficient promise that it was placed on a statutory basis. In 1974 the *Joint Funding Simplification Act* became law.

An ACIR review of the joint funding program in 1980 concluded that the act did little to resolve the difficulties that had impaired the predecessor IGA program.[129] In fact, many of the same criticisms continued to surface. Other evaluations have reached similar conclusions. A major indicator of the program's disappointing performance was that, as of July 1, 1980, there were only 46 active grant projects totaling $49.5 million, and ten of these were continuations of IGA projects. One of the primary obstacles to wider use was the lack of initiative in developing joint funding projects at the federal level. As William Thurman, head of the General Accounting Office Division of Intergovernmental Relations, testified before the Senate Subcommittee on Intergovernmental Relations in October 1979:

> The way the joint funding program has operated is that it has been left pretty much up to the initiative of state and local governments to come up with a packaging of federal programs that makes sense and then they have to grapple with the federal establishment in trying to sell their proposals.[130]

When the *Joint Funding Simplification Act* was extended in 1981 after a brief lapse, the Senate Subcommittee on Governmental Affairs reported that the federal role in the program's implementation needed to be strengthened. The committee report accompanying the bill encouraged OMB to "assume a stronger role in the future administration of the act." Yet, perhaps because the act's extension followed so closely on the heels of a change in Administrations, little was done to extend or strengthen its implementation. More may be done in the future, however, as OMB begins to explore new opportunities to "prepackage" financial assistance to recipients.

MANAGING FEDERAL CROSSCUTTING REQUIREMENTS: THE TRANSITION FROM PROCESS TO SUBSTANCE IN REGULATORY REFORM

During the 1976 Presidential campaign, President Carter promised to rationalize the federal regulatory system. While the regulatory analysis and review program was the centerpiece of his efforts, the Administration also began to standardize agency administration of a group of federal regulations that had been routinely applied to intergovernmental grants-in-aid. These "generally applicable" or "crosscutting" requirements are national policy or administrative requirements that apply to assistance programs of more than one agency or department. In 1980 there were 36 socioeconomic policy requirements and 23 administrative and fiscal policy requirements according to an OMB tabulation.[131] The former dealt with such matters as nondiscrimination, environmental protection, minority participation and labor standards; the latter involved such issues as public employee standards, general administrative and procedural requirements, and recipient-related administrative and fiscal requirements.

The number of crosscutting requirements has grown sharply since passage of the *Civil Rights Act of 1964*, banning racial discrimination in all federally assisted programs. In response, criticism of this proliferation has mounted. In its 1977 report on the intergovernmental grant system, ACIR found that generally applicable requirements affected widely divergent and fundamental matters of state and local government. Although the general objectives of most crosscutting requirements were found to be desirable, many requirements were being administered differently from agency to agency, with wide variations in compliance from one program to another, and conflicting requirements in some cases.[132]

As described earlier, Carter Administration actions to mitigate problems resulting from this fragmented pattern of implementation first took the form of efforts to improve federal management of the three major crosscutting requirements: civil rights, environment, and citizen participation. In a 1977 memorandum to the heads of federal agencies and departments, the President asked three agencies—the Council on Environmental Quality (CEQ), the Community Services Administration (CSA) and the Department of Justice—to compile and examine existing practices in these areas. CSA efforts produced a single handbook of all federal citizen participation requirements, and investigations by CEQ and the Justice Department resulted in consolidating environmental and equal employment crosscutting requirements.

EQUAL EMPLOYMENT

In 1977, ACIR identified nearly 40 different federal statutes and orders with widely applicable nondiscrimination requirements, enforced by 18 different federal agencies and departments.[133] The resulting overlap of responsibilities was regarded as an administrative nightmare by those affected and a major obstacle to effective enforcement by civil rights groups. Thus, to clarify agency roles in implementing civil rights crosscutting requirements and to fulfill a campaign promise to improve the federal government's enforcement of equal opportunity statutes, President Carter undertook a sorting out of such responsibilities among federal agencies. The consolidation of duties that resulted from these efforts gave major new responsibilities to Equal Employment Opportunity Commission (EEOC), expanded the Department of Labor's responsibilities for contract compliance, and increased and clarified the Justice Department's responsibilities for litigating civil rights suits against state and local governments. (Major changes are described in *Exhibit 6–1*.)

Few studies of the implementation of this reorganization of equal employment responsibilities have been undertaken. In 1981, the General Accounting Office GAO) found that EEOC had been fairly successful in implementing the *Equal Pay* and *Age Discrimination Acts*. Trans-

Exhibit 6–1

Carter Administration Reorganization of Agency Roles in Equal Employment Crosscutting Requirement Enforcement

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- Reorganization Plan No. 1 of 1978, implemented by EO 12086, abolished the Equal Employment Opportunity Coordinating Council (EEOCC) and transferred its responsibilities to the EEOC. EEOC was charged with developing uniform enforcement standards for all agency equal employment regulations and standardizing data collection procedures.
- EO 12086 also transferred responsibility for enforcing the *Equal Pay Act of 1963* and the *Age Discrimination in Employment Act of 1967* from the Labor Department to the EEOC, effective July 1, 1979.

DEPARTMENT OF LABOR

- Under EO 12086, the Department of Labor's Office of Federal Contract Compliance assumed sole responsibility for enforcing equal employment opportunity statutes in federal contracts. Previously, the department had coordinated compliance enforcement by nearly one dozen separate agencies.

DEPARTMENT OF JUSTICE

- Reorganization Plan No. 1 transferred full responsibility for litigation against state and local governments, as established by the *Equal Employment Opportunity Act of 1972*, from EEOC to the Justice Department. The effect of this transfer was to place all phases of such disputes—from initial investigation to litigation—in a single organization. EO 12067, implementing Section 5 of the Reorganization Plan, became effective July 1, 1978. It did not diminish EEOC's right to make an administrative determination of discrimination.

fer of coordinating responsibilities was also regarded to have gone smoothly. GAO reported that the EEOC had begun "a study of all federal equal employment opportunity programs and activities with the goal of standardizing all procedures and practices that may not be duplicative and inconsistent."[134] While GAO's findings are certainly encouraging, they report only the earliest phases of implementation and must, therefore, be regarded as preliminary.[135]

Analysis of EEOC activities has been limited thus far, but more is known about them than about the Justice Department's activities. No evaluation of its progress in consolidating responsibilities for all phases of litigating civil rights disputes with state and local governments has been conducted. Nor has there been any evaluation of the Labor Department's efforts. However, an official in the Office of Federal Contract Compliance maintains that the consolidation has produced benefits for all federal contractors, including state and local governments.[136] The 12 regional and 71 area offices of the department are now solely responsible for hearing initial contract compliance disputes. In addition, Labor's contract compliance regulations have replaced individual agency requirements, giving state and local governments one set of policies and regulations to contend with instead of a dozen.[137]

ENVIRONMENT

The most important and troublesome environmental crosscutting requirement has been the environmental impact statement which fulfills Title II of the *National Environmental Protection Act* (NEPA). This procedure is intended to assure consideration of the environmental impact of major federal and federally funded actions. Title II also created the Council on Environmental Quality (CEQ) to serve as guardian for environmental concerns within the executive branch.[138] Although CEQ was the logical place for it, Richard Liroff notes that "[NEPA] did not clearly delegate to [CEQ] responsibility for developing guidelines for agency implementation of the statute's procedures."[139]

EO 11514, issued by President Nixon in 1970, changed this situation.[140] This order gave primary responsibility for overseeing Environmental Impact Statements (EIS) to CEQ which, over time, issued a series of EIS guidelines. Although CEQ considered its guidelines "nondiscretionary," agencies did not. This difference of opinion led to substantially different agency practices. According to CEQ:

> The result has been an evolution of inconsistent agency practices and interpretations of the law. The lack of a uniform, governmentwide approach to implementing NEPA has impeded federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process. It has also caused unnecessary duplication delay and paperwork.[141]

To correct these problems, President Carter issued EO 11991 on May 24, 1977, directing CEQ to issue new EIS regulations.[142] CEQ undertook an ambitious schedule of public hearings and consultations shortly thereafter, and on July 30, 1979, the new EIS rules became final.

The new regulations are regarded as a substantial improvement over the old. They bind all federal agencies to a single EIS structure and format, and they provide uniform guidance to the courts on the procedural aspects of NEPA. A number of their provisions will benefit state and local governments directly, including those . . .

- reducing the length of EIS's to a normal length of 150 pages;
- requiring the use of plain language and consistent terminology throughout;
- requiring federal agencies to use a single, standard format;
- allowing federal agencies to prepare EIS's jointly with state and local governments that have their own comparable "little NEPA" requirments;
- providing for simplified procedures when making minor changes in EISs;
- reducing paperwork reporting requirements; and,
- requiring time limits to be set for the

Exhibit 6–2

The Problems of Agency Administration of Federal Crosscutting Requirements

- Responsibility for crosscutting requirements is so widely dispersed within the federal government that no formal process exists for uniformly communicating information about them to any federal agency.
- Some requirements emanate from a number of agencies in the form of various pieces of legislation, guidance, etc., so that state and local governments' task of sorting them out and understanding their implications is complicated and time consuming.
- There is often considerable delay between the time a requirement becomes law and the time when official implementing guidance is issued to the agencies by the appointed lead body. In many cases, this delay is equal to or greater than the time lag within the assistance agency in taking action on the requirements.
- Some requirements conflict with others or with individual assistance program purposes, but there are few established processes for resolving the conflicts without resort to the courts.
- Some of the larger executive departments are not organized or equipped to manage general assistance policies on a departmental basis.
- Some generally applicable requirements are shunted off to specialists and administered in ways that are not consistent with the assistance programs to which they apply.
- The effectiveness of the requirements and their implementation often is not evaluated on any regular basis.
- No matter how consistent the framework may be in which federal policy requirements are transmitted to any agency, they are treated and implemented differently depending on the interest in and the attention paid to the contents prior to the formal introduction of the requirement into a department.
- Stronger central leadership is needed in the management of generally applicable requirements and OMB is the most appropriate organization to provide it.

Source: Office of Management and Budget, *Managing Federal Assistance in the 1980's*, vol. 1, *Working Papers*, (Washington, DC: Office of Management and Budget, June 1980), pp. A-3-16—A-3-29 and *Federal Register 45* (November 7, 1980), p. 74416–20

NEPA process when requested by applicants.[143]

While the new rules require that all agency implementing regulations—proposed or final— be submitted to CEQ for evaluation, and while CEQ has expressed its intention to use its new powers under the executive order to ensure full agency conformance, little is known about the results so far. In particular, no analysis of reductions in compliance burdens has been undertaken. Still, CEQ has published in the *Federal Register* a total of ten progress reports. In the latest, published May 7, 1981, it was reported that 62 agencies had issued final approval EIS implementing regulations, 16 had published proposed rules under evaluation by CEQ, and only 11 had still to propose them.[144]

AN OMB MANAGEMENT CIRCULAR TO STANDARDIZE THE ADMINISTRATION OF CROSSCUTTING REQUIREMENTS

In Congress, meanwhile, a growing awareness of the problems posed by crosscutting requirements led to the incorporation of Section

8 in the *Federal Grant and Cooperative Agreement Act of 1977*. This section called upon the Director of OMB to determine, among other things, the feasibility of developing a comprehensive system of guidance for federal assistance programs. Pursuant to this Congressional mandate, OMB conducted a study of crosscutting requirements as part of its general look at the management of federal assistance. A task group found a number of problems with the way the requirements were being administered, confirming ACIR's earlier findings. (*Exhibit 6–2* summarizes the problems that have been associated with crosscutting requirements.)

On the broad issue of improving assistance administration generally, OMB recommended that Congress enact legislation authorizing it, among other things: to direct the executive departments and agencies to establish clear points of responsibility for coordinated implementation of assistance policy; to establish a governmentwide process for developing, implementing and evaluating assistance policies; and, to suspend temporarily the operation of regulations or guidelines for implementing a general assistance policy statute if it becomes evident that, unless suspended, serious unanticipated disruption will result.[145]

The report recommended that the President designate OMB as the assistance policy focal point in the executive branch. It identified 11 actions that were being taken or planned by OMB in pursuit of this responsibility including specifying the process for developing, implementing and evaluating governmentwide assistance policies.[146]

Carter Actions to Implement OMB Findings

To implement the study recommendations, President Carter directed OMB to develop and administer a process for coordinated development, issuance, implementation and evaluation of crosscutting assistance policy guidance. OMB thereafter prepared a proposed circular on "Managing Generally Applicable Requirements for Assistance Programs," which was published with a request for comment in the *Federal Register* of November 7, 1980.[147]

The proposed circular was designed to perform four functions: provide general policy statements to guide agency actions in the management of generally applicable requirements; describe the basic phases of a five-step process to be used in managing each requirement; specify the responsibilities of federal agencies and OMB; and serve as the unifying framework for more detailed or specific guidance as it was developed. Key sections of the circular provided that:

- a guidance agency would be designated for each generally applicable requirement that needs consistent, governmentwide implementation;
- guidance (explanations, elaborations and interpretations written by guidance agencies to assistance agencies) would be compatible with the programs and recipients to which it applied and would be implemented by assistance agencies to ensure the greatest consistency for each recipient of two or more programs; and,
- implementation and accomplishments were to be evaluated on a periodic basis.

The management process stated who should do what in the development of policy and the development, promulgation, implementation and evaluation of guidelines. The proposal did not suggest, however, that crosscutting requirements sought to be substantively reduced or eliminated.

Withdrawal of Proposed Circular

After expiration of the comment period, OMB's proposed circular was revised and prepared for approval and promulgation. In the meantime, however, the Reagan Administration took office, and it decided not to adopt the uniform approach to improving the administration of crosscutting requirements incorporated in the proposed circular. Instead, the new Administration sought substantive and administrative changes tailored to individual crosscutting requirements as part of an alternative strategy for intergovernmental deregulation.

Currently, the Executive Office of the President has taken the lead in reforming crosscuting regulations. OMB has sought to limit the application of crosscutting requirements to the new block grants in social services, education, health and community development. Moreover, if the federal intergovernmental aid system is further cut back in fiscal years 1983 and 1984, as is being proposed by the Administration, the range of applications of federal crosscutting regulations will almost certainly be further reduced. Changes in specific requirements are also being considered by the President's Task Force on Regulatory Relief.

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This section has described standardization and coordination strategies that the federal government frequently has used to simplify overly complex, conflicting, or duplicative regulations.

But standardization has not always proved to be an adequate solution to the problems of regulatory "red tape." Indeed, some critics have suggested that it may lead to excessive uniformity because it requires an "averaging" of the different requirements agencies impose. Such a process, some have argued, may reduce burdens from some regulations and for some grant recipients while raising compliance standards for others. Other critics have raised questions about the effect of over-standardization on agencies' abilities to implement and oversee their own programs, or they have suggested that standardization may obscure the need for more fundamental regulatory reform.

These criticisms reflect an increasingly skeptical attitude toward procedural approaches to regulation and regulatory reform. The marked change from the late 70s to the early 80s in OMB's approach to managing federal crosscutting requirements demonstrates how this increased skepticism has, in some cases, already led some reformers to focus on altering the substance of specific regulations rather than altering or standardizing the processses by which regulations are made. What follows is an overview of recent attempts to achieve substantive reform of regulation.

A REVIEW OF FEDERAL SUBSTANTIVE REGULATORY REFORMS

Beginning with President Carter's regulatory reform program, there has been a growing belief in Washington that procedural reforms affecting future regulations may be inadequate. Better regulation, some critics believe, may require changes in the substance of existing regulations to make them less intrusive or more efficient. They propose that existing command-and-control strategies be modified or replaced by new, more flexible regulatory techniques or systems of economic incentives. At a minimum, they believe that the regulators should permit regulatees to determine how best to achieve federal program standards and objectives.

These goals have been part of a broad deregulation movement affecting many areas of federal policy. Efforts to deregulate and strengthen private competition in the airline, gas and oil industries have been supported by Republicans and Democrats alike. Deregulation has also drawn support from a variety of economists, who advocate replacing traditional regulation with innovative pricing systems that promise to achieve regulatory goals more efficiently.[148]

In the area of intergovernmental regulation, subtantive deregulation has taken several forms. In 1980, President Carter directed agencies to experiment, where appropriate, with a series of innovative alternatives to standard regulation. That same year, Congress passed the *Regulatory Flexibility Act* to reduce regulatory burdens on small businesses and units of government. Finally, President Reagan's Task Force on Regulatory Relief is currently engaged in a broad review of existing regulatory programs, seeking ways to reduce burdens and to maximize cost effectiveness.

Innovative Regulatory Techniques: Alternatives to Prescriptive Regulation

Although federal regulators have not always relied on highly prescriptive, closely monitored approaches to regulation, they generally have chosen this course. Moreover, the choice of regulatory technique has often been a matter of agency discretion. President Carter attempted to redress this situation in EO 12044, which launched his regulatory reform program.

The executive order provided the basis for a governmentwide campaign, spearheaded by the Regulatory Council, to use less burdensome, more economical regulatory approaches. "Innovative Techniques" was a term coined during that period to describe a range of alternative, market-type regulatory strategies. Today, these techniques recieve more systematic agency consideration because they have been incorporated into OMB's regulatory review and analysis program.

INNOVATION IN THE CARTER ADMINISTRATION

In the wake of EO 12044, many federal agencies developed new approaches to regulation that provided increased flexibility and decentralized decisionmaking. On June 13, 1980, President Carter built upon this foundation and directed the heads of major federal regulatory agencies to employ specific innovative regulatory techniques wherever possible. Of the eight techniques cited in the directive, five can apply to intergovernmental regulation: performance standards; tiering; marketable rights; economic incentives; and compliance reform.[149]

Performance Standards

The use of performance standards involves regulating through general performance criteria rather than by detailed specification of the means of compliance. Performance standards potentially permit greater freedom of action to regulated entities and reduce compliance costs. It is argued that they provide more freedom to discover new and more efficient compliance technologies among the regulated. In addition, performance standards may be especially beneficial in the regulation of state and local governments because they allow regulation to be tailored more easily to current state and local law and existing governmental structures.

Performance standards, however, may be no panacea. Skeptics have observed that their indiscriminate use could ultimately prove more burdensome to state and local governments than the more familiar command-and-control techniques if the standards are unattainable. Moreover, performance standards are only appropriate where reasonable and achievable measures of performance can be devised.

Tiering

"Tiering" regulations means tailoring regulatory requirements to fit the size or nature of the regulated entity. Tiering is viewed primarily as a means of reducing unnecessary regulatory burdens associated with federal recordkeeping and reporting requirements, but it may be applied to compliance requirements as well. Tiering provided the conceptual basis for the *Regulatory Flexibility Act of 1980* which is discussed later in this chapter.

Marketable Rights

Regulation frequently takes the form of allocating scarce resources. The traditional approach is for the government to decide, case by case, who is permitted to undertake particular activities and who is not. An alternative approach is to create "rights" for conducting these limited activities and then to allow the rights to pass by trade or sale among bidders. For example, four federal agencies are sponsoring a $4 million demonstration grant program to help urban areas attract new industries and revitalize present ones while meeting clean air requirements.[150] Under the program, selected urban areas are developing innovative approaches for promoting both economic growth and better control of air pollution—including offset banking, trading of emission rights and emission density zoning. Overall, a marketable rights approach attempts to remove the government from difficult and contentious decisions about who can "best" use a limited resource. Instead, the market allocates rights according to which users can derive the most value from their use, measured according to their willingness to pay. In addition to efficient use of limited resources, a marketable rights scheme is believed to stimulate development of appropriate innovations for future use.

Economic Incentives

Many regulatory programs have been set up to correct the economic sector's failure to satisfy public expectations. In many of these cases, market failure resulted because private sector costs did not accurately reflect total costs to society. Pollution is the best known example of this kind of market failure. An air polluter incurs no direct cost from its emissions, yet downwind communities must pay for the resulting health and material damage. In such cases, the traditional regulatory response has attempted to eliminate or restrict the unwanted activity and assess fines against violators.

In contrast, an incentives approach seeks to correct the problem by proper pricing. Price corrections are the most common form of economic incentives and are generally applied through fees or subsidies. Major benefits ascribed to economic incentives are that they encourage improvement beyond a particular standard and at a faster pace. Of particular significance to states, which frequently are coregulators of air and water pollution, pricing requires less continuous government involvement, thereby reducing administrative costs of regulation to the states.

Compliance Reforms

Compliance reforms involve market-oriented procedures to replace or supplement strict governmental monitoring and enforcement in regulation. They include both "third party monitoring" and "penalties that reflect the degree of noncompliance." The compliance reform that is most significant for intergovernmental regulation, however, is "self certification" whereby state or local governments certify their own regulatory programs to be consistent with federal standards.

Certification can be approached in a number of ways. In the first case, federal regulators could assess the adequacy of state and local laws and regulations in relation to their own federal laws and regulations and authorize substituting state and local regulations for federal ones where such action would result in equivalent or higher performance of regulatory responsibilities. A second and more relaxed approach is now being used in the nine recently enacted block grant programs for health, education, social services and community development. In this form, state and local governments certify generally that federal regulatory intentions will be achieved. Proof of compliance is supplied through performance reporting and follow-up action undertaken largely by the regulated entity itself.

IMPLEMENTING INNOVATIVE TECHNIQUES

To increase the use of these approaches among all federal agencies, in 1980 President Carter asked the 35 agencies affiliated with the Regulatory Council to conduct a review of their programs to see where innovative techniques might be applied. To assist agencies in conducting these reviews, the council held a governmentwide conference on innovative techniques. The conference was intended to provide a forum for regulators to "roll up their sleeves and go beyond general philosophizing to exchange information on curent practices with particular innovative techniques across the federal government."[151]

As part of its review of agency progress, the Regulatory Council published a report inventorying the use of innovative regulatory techniques among federal agencies. The inventory showed a modest departure by agencies from traditional command-and-control regulatory approaches with some of the new techniques being applied to intergovernmntal regulation. (See *Figure 6–3.*)

EXPANDED USE OF MARKET-TYPE REGULATORY TECHNIQUES UNDER THE REAGAN ADMINISTRATION

The regulatory reform program launched by President Reagan under EO 12291 has expanded and accelerated the drive toward market-type regulatory strategies. Earlier efforts were important first steps, but they were largely ad hoc, depending on Regulatory Council vigilance and agency good will. The program now has an institutional basis as part of the new administrative regulatory review and analysis program monitored by the Office of Information and Regulatory Affairs in OMB. Now agencies must routinely consider economic regulatory alternatives as part of their regulatory analyses and reviews of proposed rules. In addition, as was described earlier, agencies also must consider less prescriptive alternatives in their semi-annual regulatory agendas. Data on the results of these efforts is only beginning to come in and has yet to be compiled by the Office of Information and Regulatory Affairs. However, a study by the General Accounting Office indicates that consideration of regulatory alternatives continues to fall short of the administration's goals.[152]

The Regulatory Flexibility Act of 1980

Although the development of economic regulatory alternatives has been primarily an executive branch undertaking, the *Regulatory Flexibility Act of 1980* indicated Congressional interest in the use of these techniques. The act provides a statutory basis for the expanded use of tiering to make federal regulations more flexible and less burdensome to small organizations. It charges federal regulators to anticipate and reduce the impact of regulations and paperwork for governments with populations under 50,000 as well as for small businesses and other small entities. If adhered to, the act's standards of federal regulatory behavior could reduce the regulatory burden on small cities, counties, towns, townships, villages, school districts and other special districts—over 40,000 small local governments in all.

Under the act, federal regulators are expressly required to consider alternative ways of adjusting regulations to better reflect the capacities of small entities. Executive branch and independent agency federal regulators also are required to try harder to notify small entities of proposed regulations that will affect them and to acquire their participation in developing and considering regulatory alternatives. The act lists specific procedures agencies may use to generate this participation and it designates a single federal officer, the chief counsel for advocacy in the Small Business Administration, to monitor governmentwide performance in regulating small entities.

AGENCY RESPONSIBILITIES

To meet these requirements, agencies are directed to publish, beginning in April 1981, and in every October and April thereafter, a regulatory flexibility agenda listing rules for which the agency anticipates publishing a Notice of Proposed Rulemaking in the *Federal Register*.[153] Rules to be included are those having a probable significant econmic impact on a substantial number of small entities. Moreover, when such rules are published as NPRMs, an agency must prepare and make available for public comment an "Initial Regulatory Flexibility Analysis" (IRFA), to be published in the *Federal Register* with the NPRM. The initial flexibility analysis must contain:

- a rationale for the agency's action;
- the objective and legal basis for the proposed rule;
- an estimate of the type and number of small entities it will affect;
- a detailed estimate and description of the reporting, recordkeeping and compliance requirements anticipated;
- an identification of relevant federal rules that may conflict with, duplicate or overlap the proposed rule; and
- a specific discussion of alternatives to the rule that could accomplish the same objectives, such as different standards for large and small entities' (multitiering) performance standards, or exemption of small entities.

When an agency promuglates a final rule, it now must also publish a final regulatory flexibility analysis (FRFA). The FRFA is to focus on how the agency handled issues raised during the initial analysis as well as its responses to public comments received as a result of publishing the initial analysis.

The act also requires agencies, within ten years, to examine systematically their existing and outstanding rules with respect to small entities. Agencies are to consider the continued need for such rules, public complaints regarding them, their complexity and the extent to which they conflict with or duplicate other regulations—both federal and state.

IMPLEMENTATION: THE FIRST YEAR

The *Regulatory Flexibility Act* has been in effect scarcely a year, but oversight already has

Figure 6–3

Innovative Techniques Applied to Intergovernmental Regulation, October 1980

DEPARTMENT OR AGENCY	INNOVATIVE TECHNIQUE APPLICATIONS*
	Performance Standards
Education	Collection requirements to be eased for colleges with excellent collection records
Health and Human Services	Performance standards for state administered AFDC programs
	Project to reduce process requirements in state plans
Environmental Protection Agency	Urban demonstration grants cost controlled trading and other innovative approaches
	Clean air bubble policy established
	National interim regulations for drinking water implemented as performance standards
Equal Employment Opportunity Commission	Employee selectin procedures set on a performance basis
	Tiering
Education	Regulatory Requirements for bilingual education programs tiered according to the size of school systems and other circumstances
	Recordkeeping requirements for grantees will be based on size of grant
	Recordkeeping requirements for grantees will be tiered for small projects
Health and Human Services	Certain requirements for day care centers receiving limited amounts of federal funding waived
Housing and Urban Development	More flexible standards for small cities applying for Urban Development Action Grants
Occupational Safety and Health Administration	Tailoring reporting requirements and abatement schedules to size of business
	Eliminated recordkeeping requirements for businesses with ten or fewer employees

Transportation	UMTA tiering regulations for awarding grants to small urban areas
Environmental Protection Agency	Regulatory distinctions based on number of people serviced by water system
Equal Employment Opportunity Commission	Recordkeeping and documentation requirements reduced for employers with under 100 employees
	Marketable rights
Environmental Protection Agency	New pollution sources may trade for emission rights
	Economic Incentives
Education	Urban waste demonstration facilities guaranteed program uses incentives
	Set federal price supports for municipal waste reprocessing demonstration facilities
	Financial assistance for municipal waste uses incentives approach
	Energy conservation incentives in schools and hospitals set
	State energy conservation program has economic incentives
Transportation	Para-transit grant program utilizes user-ride subsidies
Environmental Protection Agency	Economic incentives for hazardous waste siting
	Compliance Reform
Commerce	Self certification of energy conservation performance in federally financed constructions required to receive financial assistance
Transportation	Certification of compliance with highway grant program requirements permitted

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*Although the council report provides a good summary indication of the use of innovative techniques, the tabulation cannot be regarded as exhaustive. In addition, most of the regulations described here affect only some state and local governments, few, if any, affect a majority.

Source: Adapted from Appendix I, "Innovative Techniques Scoreboard," in U.S. Regulatory Council, *Regulating with Common Sense: A Progress Report on Innovative Regulatory Techniques* (Washington, DC: U.S. Regulatory Council, October 1980.)

begun. Both the House and Senate Subcommittees on Small Business held hearings on the act in early 1982, and the chief counsel for advocacy has monitored its implementation. Thus far, all indications are that the act has produced little relief for small governments.[154]

The lack of interest shown by agencies in tiering their regulations on behalf of small governments results from a number of factors. The act's legislative history suggests that the major sources of support for the program were the small business community and their subcommittees in Congress. Originally, small governments were not even included in the bill, nor was their addition the product of a groundswell of support. Small governments were first included, without Congressional hearings, during a Senate mark-up session in July 1978.[155] Although the bill was not enacted in 1978, when it became law in 1980 small governments were included.

Because the act was passed primarily to benefit small business, monitoring and oversight responsibilities were placed in the Small Business Administration. The SBA has had little experience dealing with small governments, however, so it is not surprising that it has not acted aggressively on their behalf.[156]

In addition, the law's emphasis on economic effects may work against agency consideration of important nonfiscal effects on small government. Because nonquantifiable effects do not fall under commonly held, but often overly simple, definitions of economic impact, they may not be recognized when agencies identify potential impacts on small entities.

Finally, full implementation of the act may be hindered by mistaken perceptions that intergovernmental regulation already has been sufficiently reduced as a result of recent block grant initiatives. Although grant consolidation has reduced the burdens resulting from some forms of intergovernmental regulation, the need for flexibility and innovative mechanisms has not disappeared.

President's Task Force on Regulatory Relief

Earlier portions of this chapter focused on the process developed by the Reagan Administraton for reviewing newly proposed regulations. Although it is more far-reaching than its predecessors, this process—even if it is totally successful—will only produce a reduction in the rate at which intergovernmental regulation grows. It does not address the burden posed by the substantial number of *existing* intergovernmental regulations.

Accordingly, EO 12291 also created the "President's Task Force on Regulatory Relief" and empowered it to review existing rules—identifying those that are duplicative, inconsistent, or overlapping, or that do not measure up to the regulatory standards set forth in the order. The task force may designate any existing rules for review and may require agencies to prepare cost-benefit analyses of these rules.

On February 22, 1981, the President announced that the task force would be chaired by Vice President Bush. The following month the Vice President announced its charter, composition and plan of action. The task force is an interagency committee composed of representatives of the Vice President's Office, the President's assistant for intergovernmental affairs, the assistant to the President for public policy, the Chairman of the Council of Economic Advisors, the Attorney General, the Director of OMB, and the Secretaries of Treasury, Commerce and Labor. The staff assigned to the task force is drawn from OMB's Office of Information and Regulatory Affairs (OIRA), and OIRA's administrator serves as executive director to the task force.

EO 12291 APPLIED TO EXISTING REGULATIONS

The task force has taken a piecemeal approach to designating existing rules for review. As a starting point, the task force sought information from those affected by federal regulations, including state and local governments and their associations, about rules felt to be particularly burdensome, inefficient or inequitable.

This request generated a tremendous amount of documentary material from state and local government associations, including lists of rules they believe merit reexamination. An OMB inventory of proposals submitted to the task force indicated that all seven of the major public interest groups submitted documents, as did 17 individual states, 26 counties, 12 regional planning bodies, and 9 municipalities. Taking grant, regulatory and tax-related rules together, these included some 2,800 submissions.[157] Although many were duplicative, the range of submissions was wide. Programs most often identified as burdensome were: regulations implementing the *Clean Air Act Amendments of 1970;* clean water and safe drinking water regulations; Titles VI and VII of the *Civil Rights Act of 1964; National Environmental Policy Act* regulations; Titles I and IV of the *Elementary and Secondary Education Act*; vocational education and rehabilitation regulations; *Education for All Handicapped Children Act* requirements; food stamp regulations; Aid to Families with Dependent Children program rules; low-income energy assistance grant regulations; *Environmental Protection Act* construction grant regulations; Medicaid rules; Health Planning requirements; rules relating to the Community Development Block Grant Program and its Housing Assistance Planning requirements; federally assisted single family and multifamily housing regulations; the *Davis Bacon Act; Comprehensive Employment Training Act* rules; Urban Mass-Transit rules; and highway and highway safety program regulations.[158]

Based on these submissions and recommendations from groups in other sectors of the economy, the Task Force designated 111 federal regulations for immediate review and possible revision by federal agencies. Of this initial total 27—or nearly 25%—were intergovernmental in character.[159] *Exhibit 6-3* lists these regulations.

TASK FORCE PROGRESS

A recent report by the Task Force on Regulatory Relief indicates the extent of progress in the effort to date. As of August 1982, the task force had completed action on 13 of the 27 intergovernmental regulations selected for initial review.[160] Regulatory modifications resulting from these reviews were estimated to total $4–6 billion in one-time savings for state and local governments and an additional $2 billion in annually recurring costs.[161] The task force also estimated these regulatory actions will reduce paperwork costs to state and local governments by nearly 12 million work hours each year.[162] Examples of prominent regulatory relief actions taken by the Administration thus far include:

- revised rules to permit local authorities more discretion in providing the handicapped with access to mass transit, estimated to save $2.2 billion in capital costs;
- withdrawal of Department of Transportation rules relating to urban transportation planning analysis, uniform traffic control devices among the states, and procedures for governing bus rehabilitation and emergency stockpiling;
- withdrawal of the Education Department's proposed rules requiring local school districts to instruct children not proficient in English in their native languages;
- review of the Education Department's rules requiring schools and colleges receiving federal grants to spend as much on women's athletic programs a men's; and,
- proposed changes in the administration of *Davis-Bacon Act* requirements establishing prevailing wages for federally aided construction projects; estimated annual savings of $585 million.[163]

While these actions have been impressive, a variety of difficulties have confronted the regulatory relief effort. Some of the regulatory initiatives have been blocked by Congress or the courts. The Davis-Bacon reform, for example, has yet to take effect pending legal action. Similarly, the Administration's proposals concerning handicapped education requirements met such a storm of criticism from affected families and from Congress that they were withdrawn. State and local governments have also complained that, apart from their initial submissions of lists of problem mandates, the President's task force has sought little consultation or input from them concerning the substantive reform process.[164] Perhaps the most common criticism thus far, however, has been a sense of disappointment with the results of substantive reform. One critic described the problem this way:

Exhibit 6–3

Programs Affecting State and Local Governments Designated by the President's Task Force on Regulatory Relief for Substantive Reform

ARMY CORPS OF ENGINEERS

- Dredge and Fill Permit Program—Section 404 of the *Clean Water Act*.
- Water Conservation Clause Planning Requirements (Presidential Memo July 12, 1978)

OFFICE OF MANAGEMENT AND BUDGET

- A–95 Project Notification and Review
- Urban Impact Analysis

FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION

- National Flood Insurance Program *(Flood Disaster Protection Act)*

EDUCATION DEPARTMENT

- Title IX—Sexual equality in athletic programs
- Section 504 of the *Handicapped Rehabilitation Act* requiring nondiscrimination on the basis of handicap
- *Education For Handicapped Children Act* requirements

ENVIRONMENTAL PROTECTION AGENCY

- Consolidated Pollution Control Permits
- Industrial Wastewater Pretreatment Requirements

DEPARTMENT OF HOUSING AN URBAN DEVELOPMENT

- CDBG regulations including: citizen participation; expected to reside requirement in housing assistance plan; small cities requirements; and, neighborhood strategy areas targeting requirements
- Environmental Impact Statements (NEPA)
- Utility allowance requirements in Public Housing Authority projects
- Lease grievance procedures in Public Housing Authority projects
- Minimum property standards in federally assisted housing units

DEPARTMENT OF HEALTH AND HUMAN SERVICES

- Medicaid requirements for the states
- Health care institutions certification and surveys

DEPARTMENT OF THE INTERIOR

- Surface Mining Regulations

OFFICE OF PERSONNEL MANAGEMENT

- Federal standards for merit system of personnel administration

DEPARTMENT OF AGRICULTURE

- National School Lunch Program Reporting requirements

DEPARTMENT OF ENERGY

- Residential Conservation Service Program

DEPARTMENT OF JUSTICE

- Section 504 of the *Rehabilitation Act*

DEPARTMENT OF TRANSPORTATION

- Section 504 Requirements—Transportation
- Highway statistics reporting requirements
- Design standards for highways and geometric design standards for resurfacing, restoring and rehabilitating highways

DEPARTMENT OF LABOR

- Davis-Bacon requirements
- Labor standards provisions of construction contracts.

Source: Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief for State and Local Government: A Progress Report*, Washington, DC, August 1982 (Processed).

> Unfortunately, judged against the results expected because of ... campaign rhetoric ... the Administration's regulatory reform program to date appears shallow, weak and poorly focused.... After one year in office the Vice President's task force has identified only 100 rules to review.... Certainly [it] should be able to find more than 100 rules needing changing ...[165]

Others believe that after a fast start, "... the prospects for substantive regulatory reform look dimmer today than they did nine months ago."[166] Various reasons have been offered to explain this result.

IMPLEMENTATION PROBLEMS

Part of the problem has been explained in management terms—the process through which rules must go if they are to be modified administratively. Others maintain that there is a problem of overconcentration on administrative approaches rather than on the regulatory statutes themselves, which, these experts hold, are the real source of the problem. Each of these contentions is examined in turn.

Managing the Review Process

Historically, the procedure for modifying existing rules has followed the same course as that for promulgating entirely new ones. Pursuant to requirements of the *Administrative Procedure Act,* an agency publishes an NPRM in the *Federal Register;* after public comment, a final rule may be issued. EO 12291 added several steps to this process, requiring that executive branch agencies first submit proposed or final rules—both new and newly modified ones—to OIRA staff for evaluation. But it has not changed the notice and comment process itself. Moreover, the process used to review existing rules that are proposed for modification is identical to that for newly proposed rules. Regulations are examined by the OIRA staff for consistency with the principles set forth in the executive order. If found wanting, they are returned to the responsible agency for reevaluation. At this point, the agency may rewrite or withdraw the rule, or it may take no action. Once the agency has revised the rule, however, it must be submitted to OIRA again for review. Should OIRA approve the revision, an NPRM may be published in the *Federal Register*, which begins the notice and comment phase of rulemaking. When a final rule is to be published, the OIRA review is repeated.

One important difference between routine agency review of existing rules and task force designation of a rule may contribute further to delay. In the first case, modification is the agency's own idea; in the second it is not. Although promulgating rules was never intended to be speedy, the process is apt to be especially slow when imposed from outside. In the words of OIRA's Regulatory Policy Branch chief, "From the OMB standpoint, it takes a lot of pressure to get agencies to modify their rules."[167] In the process of doing so, OMB has encountered significant organizational inertia and lobbying on behalf of individual regulations.[168] According to this view, the assistance and support of top agency management officials is of fundamental importance.

From the agency perspective, the process may be protracted because established rules frequently become standard operating procedure. Although persons familiar with a regulation's legislative history may have left the agency, the history—together with the rule's rationale and its implementation record—must be known before a change is made. Staff may question the desirability of modification, or they may believe that the present rule is needed to achieve the federal regulatory goal. Even if agency personnel were committed to modifying a particular rule, staff and budget cuts might make it difficult to do so in a timely fashion.[169]

Failure to Reform Existing Statutes

Some commentators believe that, thus far, the key factor limiting success of substantive regulatory reform under the Reagan Administration stems from inadequate emphasis on legislative changes in burdensome regulatory statutes. They argue that permanent substantive reform will depend upon revisions in law rather than on less rigorous regulatory enforcement, reduced regulatory agency budgets, or narrow administrative readings of regulatory statutes—all of which may be reversed by future administrations.[170] "We're very disappointed in [Reagan's] legislative regulatory reform program," one business official complained. "To really effect change it has to be done legislatively.... All the things they have done up to now have been transitory."[171] Similarly, Marvin Kosters and Jeffrey Eisenach recently observed that "It is surprising the [Reagan] Administration's program has not included proposals for legislative change." They note that "knowledgeable critics frequently place much of the blame for faulty and inefficient regulation on the basic enabling legislation."[172]

Such critics commonly point to the *Clean Air Act* as a case where legislative reform is necessary. Many regarded the act as a likely first candidate for statutory change because President Reagan had singled it out as particularly wasteful and ineffective during his campaign and because it was due to expire September 30, 1981. Moreover, many experts have pointed to notable shortcomings in the law. Robert Crandall of the Brookings Institution argues this "baroque statute" has been a particularly ineffective and expensive regualtory program:

> Federal clean air policy costs our society more than $20 billion a year and returns benefits that are modest at best. The rate of improvement in measured air quality has generally been lower since EPA was established in 1970 than it was in the decade of the 60s. Expensive controls on automobiles have not led to any discernible improvement in average smog levels.[173]

He states that:

> Had the administration been ready and willing in early 1981, it surely should have been able to launch a major assault on the more outrageous provisions of the *Clean Air Act*.... A proposal to accelerate the shift away from a cumbersome Gosplan approach and towards market incentives ... would certainly have been welcome.... Just changing a few provisions of the *Clean Air Act* and nudging the bureaucracy at EPA would ... save billions of dollars in control costs without sacrificing clean air goals.[174]

Nevertheless, 1981 came and went without any concerted effort by the Administration to revise the program's structure or its major provisions; rather, Congress adopted a simple one-year extension. Although the Administration promised to propose major amendments during 1982, this has proven difficult and some observers doubt that Congress will act before 1983.

If the *Clean Air Act* illustrates the obstacles to substantive reform through the legislative process, the development of rules for the nine new block grants enacted in August 1981, illustrates the dramatic changes possible through a combination of permissive legislation and concerted administrative leadership.[175] Altogether these grants for community development, education, social services and health folded-in nearly $8 billion in funding for some 77 grant programs. In the seven block grants administered by the Department of Health and Human Services, over 600 pages of program regulations were rendered obsolete, replaced by only seven pages of block grant requirements. Thus, from a regulatory reform perspective, the new block grants appear to be remarkably free of federal prescription.

This dramatic reduction in grant requirements is only partly the result of consolidation. As multiple programs are merged, duplicative rules can be consolidated into a single set of requirements. In the new block grants, however, this natural reduction has been maximized by the Administration's determination to implement the programs with a minimum of federal direction and guidance. For example, interim final rules implementing the new HHS block grants encouraged states to interpret the law for themselves and to develop their own procedures for compliance:

> To the extent possible, [the department] will not burden the states' administration of the programs with definitions of permissible and prohibited activities, procedural rules, paperwork and recordkeeping requirements, or other regulatory provisions. The states will, for the most

Table 6-3

Block Grant Reporting Requirements (In Paperwork Man-Hours)

	FY 81 Burden	FY 82 Burden	FY 81–82 Reduction
Social Services	4,881,433	300,000	4,581,433
Low Income Energy	82,456	32,490	49,966
Community Services	500,000	219,298	280,702
Maternal and Child Health	15,816	27,442	(+11,626)
Preventive Health	136,326	61,059	75,267
Alcohol, Drug Abuse and Mental Health	272,400	104,402	168,358
Primary Care	140,000	98,000	42,000
Education Consolidation	260,000	182,000	78,000
HUD's State-Administered Small Cities	212,000	61,725	150,275
TOTAL	6,500,431	1,086,056	−5,414,375

Source: Office of Management and Budget, *Information Collection Budget of the United States, Fiscal Year 1982*, (Washington, DC: Office of Management and Budget, 1982), p. 16.

> part, be subject only to the statutory requirements, and the department will carry out its functions with due regard for the limited nature of the role that Congress has assigned to us.[176]

Because the block grants do not have standard reporting forms of recordkeeping requirements, they dramatically reduce the federal paperwork burden imposed on state and local governments. According to OMB, paperwork will be reduced to an estimated 1.1 million work hours, from a previous estimated level of 6.5 million work hours under the former categorical grants. *Table 6-3* summarizes these reductions.[177]

Despite the Administration's efforts to achieve intergovernmental regulatory relief, however, experience from the past indicates that block grants tend to be recategorized over time.[178] Congress generally has been reluctant to relinquish permanent control over program priorities and procedures. Preliminary indications suggest that this tendency may affect the new block grants as well. Members of Congress successfully resisted several of the Reagan Administration proposals for deregulating the Community Development Block Grant for small cities.[179] In addition, court challenges are threatened over existing regulatory interpretations of the new grants.[188] Clearly, only time will tell whether the current effort to devolve control over these grants will ultimately prove more successful than past attempts.

SUMMARY CONCLUSIONS AND OBSERVATIONS

Trends in Regulatory Reform

This chapter has traced a decade of federal regulatory reform efforts. From the record of that period, several major findings emerge.

Although there has been an unprecedented increase in regulatory reform activity, this growth has been outpaced by the vastly increased magnitude of federal regulation itself. In response to a growing sense that past efforts have been insufficient to the task, the federal government has recently turned to even stronger and increasingly controversial measures to mitigate regulatory excesses. This trend culminated in several major initiatives launched by President Reagan almost immediately upon taking office in 1981, as well as in Congressional consideration of a comprehensive regulatory reform bill in 1982.

Most of this reform activity has been prompted by concerns about excessive private sector burdens, not intergovernmental ones. Consequently, few of the early initiatives were directed specifically toward problems peculiar to intergovernmental regulation. Even so, a number of changes benefited state and local governments as part of a broader drive to improve the management of federal regulatory policy. Later, as the extent of federal intergovernmental regulation began to be recognized and as sentiment grew that something ought to be done about it, federal initiatives began to focus on mitigating the effects of regulatory programs on state and local government finances and operations. These reforms, more than any that preceded them, single out intergovernmental regulation as particularly deserving of attention.

Overall, regulatory reforms have been based on one of two general models: a procedural one focusing on the processes employed by Congress and executive agencies as they make and administer federal regulatory policy and a substantive approach that examines individual regulations rather than the processes that produce them. The first approach emphasizes comprehensive changes which, if undertaken, would be as likely to affect future regulatory problems and programs as current ones. The second strategy is characteristically piecemeal, delving into the content of particular requirements in a case-by-case fashion. This approach alters specific rules to make them less burdensome, ineffective, inefficient or inequitable.

One of the principal characteristics—and problems—of regulation is that the regulator seeks the benefits of regulation while avoiding many of the costs. But attaining regulatory goals—clean air, clean water, assuring health and safety, and protecting civil rights—requires the expenditure of significant public and private resources. The costs of achieving such national goals are borne, in large part, by nonfederal actors: state and local governments, private businesses and private citizens. Because federal regulatory agencies have few incentives to keep total regulatory costs down, Presidents have devised procedural techniques to encourage agencies to regulate more economically.

Beginning with President Ford, each new Administration has required agencies to assess the costs and benefits of major proposed regulations. Yet, under both the Ford and Carter regulatory analysis and review programs, agencies were for the most part free to undertake analyses in *pro forma* fashion or to ignore their results. Most observers agree they did both. The Reagan Administration, faced with the failure of agency analyses to make a visible difference in either the quantity or character of federal regulation, began to require agencies to submit all proposed regulations to analytical review according to principles set forth in EO 12291. More important, the President instituted a strong OMB oversight program in which each agency regulatory proposal, together with its analysis, is reviewed and approved by OMB. The new program has been likened to "threading the eye of the needle" because OMB has announced its intention to approve only economical regulations for which a clear statutory basis exists.

The new process is regarded as more successful than its predecessors. As evidence of this improvement, the number of federal regulations promulgated in 1981 was vastly reduced from the previous year. In addition, it appears that regulations are being framed in a more cost-effective, economical manner. What these differences mean for intergovernmental regulation is not yet clear, however. Although the new program is the first to specifically mention state and local government costs as among those agencies should consider, the executive order does not specify what kinds of intergovernmental impacts should be included. On the other hand, because state and local governments are currently subject to so much federal regulation, they seem likely to be numbered among the program's principal beneficiaries.

At the same time that Presidents have been trying to turn federal agencies toward more efficient regulation, Congress has been looking for methods to close the gap between bureaucratic interpretation of regulatory statutes and legislative intent. The usefulness of Congress' traditional oversight tools has been diminished because oversight comes too late and is largely advisory. For these reasons, Congress has turned increasingly to the legislative veto as a technique for reviewing agencies' contemplated actions. Nearly half of the 190 laws containing legislative veto provisions were enacted in the last ten years—33 by the 96th Congress alone. Of these 33, almost 50% have some bearing on intergovernmental regulation. Historically, Congress has applied the legislative veto only to certain agencies and regulatory programs, but now it is considering an across-the-board veto provision as part of a comprehensive regulatory reform package. The advisability of such a provision is strongly debated. Advocates believe it will resolve Congress' oversight dilemma. Critics, on the other hand, believe it will inappropriately involve Congress in executive processes, prove to be unworkable, and give the potentially mistaken impression that Congress approves of regulations that pass through the process without Congressional comment.

In addition to coping with the federal bureaucracy, Congress has had equal difficulty developing a sense of policy and fiscal restraint among its own members. Consequently, Congress also has sought to address problems that result from a failure to bring information about the costs of intergovernmental regulatory legislation to bear upon its own deliberations. In an effort to highlight these costs and to minimize them, Congress enacted the *State and Local Cost Estimate Act of 1981* requiring the Congressional Budget Office (CBO) to prepare cost estimates—fiscal notes—to assist Congress' consideration of intergovernmental legislation. Recent studies indicate that the CBO will have difficulty fully implementing the act largely because of technical and data collection problems. Still, with increased staff and budget, CBO should accomplish its mission, and state experience suggests the effort will be worthwhile.

Before 1967, when national agencies set to work implementing federal intergovernmental regulatory programs, state and local governments often resembled observers of the process rather than participants in it. In some cases, they became aware of regulations only after becoming subject to them. In 1967, a new budget circular—A-85—opened a channel for formal consultation during the formative stages of agency regulation-writing between federal agencies and subnational governments, including their associations. Although the program experienced many operational difficulties, it represented the highwater mark of formal intergovernmental consultation opportunities. Over time, the scope and extent of federal regulation vastly increased, but the avenues for state and local government consultation were reduced. The reduction began when President Carter replaced the A-85 program with a decentralized, less formal consultation process that was largely ignored by federal agencies. The new program was rescinded by President Reagan, but a new consultation process has not been established under current review procedures. Thus, at the present time, the history of federal opportunities for state and local governments' consultation has come full circle— from no special consultation mechanisms in 1966, before the Budget Bureau issued Circular A-85, to a return to his situation in 1982, one year after the rescission of EO 12044.

The early 1980s mark a transition in federal regulatory reform strategies. In addition to process-related reforms, both the President and Congress have pursued additional reforms that reflect a different intergovernmental regulatory philosophy—one that is more relaxed, in which compliance is made more flexible, and where the federal presence is markedly reduced. In expressing this new philosophy, both Presidents Carter and Reagan encouraged agencies to use market-type regulatory mechanisms instead of traditional command-control techniques. It is too early to be certain about agencies' responses or the effects of the new techniques, but early impressions suggest that when alternatives are effectively employed, implementation is more efficient, effective and less intrusive. One such new technique—tiering—is now part of the *Regulatory Flexibility Act* enacted by Congress in 1980. This act requires agencies to take into account the effects their proposed regulations will have on small businesses and governments and to adjust them accordingly.

An even more forceful expression of this new philosophy is President Reagan's Presidential Task Force on Regulatory Relief. This group has been given the power to designate particularly burdensome regulations for review by agencies and by the Office of Information and Regulatory Affairs at OMB. Thus far the process has led to numerous regulatory modifications and a number of rescissions. Of the 100 plus rules that were designated for review in 1981, about one-quarter affect state and local governments. Task force efforts have already brought a measure of relief to state and local governments, principally by eliminating requirements for retrofitting mass transit systems to provide access for all handicapped persons and by withdrawing proposed regulations mandating bilingual education. Still, appraisals to date are mixed. Many people believe that the Administration has made a good start and await further action with some optimism. But some are concerned that the process has yet to tackle many troublesome regulatory statutes or to address the large body of smaller regulations that impose a significant burden on state and local governments. Furthermore, critics are concerned that state and local governments have not been consulted adequately concerning proposed revisions.

Although the task force has succeeded in eliminating a number of expensive and burdensome intergovernmental regulations, it is the enactment of nine block grants in 1981, together with OMB's success in holding their attached rules to a bare minimum, that stands out as the most visible achievement of substantive intergovernmental regulatory relief thus far. Whether this is a lasting or temporary phenomenon, however, depends on whether the tendency toward "creeping conditionalism" associated with the first generation of block grants can be resisted with the second.

Interpreting the Trends

The foregoing discussion suggests that the range of recent federal reform initiatives is wide, affecting the processes of rule development, drafting, promulgation and review as well as the substance of particular intergovernmental regulations. Such diversity reflects the plural character of regulatory policymaking. Over the past decade, Presidents, Congress, agencies, and public interest groups have promoted different reforms, many of which reflect the different stakes they have in the federal regulatory system. In part, the accommodation of their differences explains the "helter skelter" character of the reforms described in this chapter.

Generally, support for these initiatives has stemmed from a belief that they would produce greater economic efficiency, administrative effectiveness or political accountability. But preferences also have been based on strategic considerations. For example, Presidents have supported administrative regulatory review and Executive Office of the President oversight because they enhance presidential control. Congress has advocated a legislative veto of rules and regulations, believing such a veto would increase its capacity to oversee the bureaucracy. Finally, public interest groups have sought to restore their access to regulatory policymaking. *Figure 6–4* depicts the range of past, current and proposed initiatives that affect intergovernmental regulation; it also suggests who among the Congress, the President, federal agencies and state and local governments and their associations is likely to benefit from each.

Overall, the pattern suggested is one in which Congress, the President, state and local governments, public interest groups and the public-at-large all seek to gain more power

Figure 6–4

Range of Discontinued, Current and Proposed Federal Regulatory Reforms and the Distribution of Their Benefits Among Key Actors in the Intergovernmental Regulatory System, 1975–82

Principal Beneficiaries

	President	Congress	State and Local Governments and Public Interest Groups	Federal Agencies
DISCONTINUED			Regulatory Calender A–85 (and other procedures Plain English Advance Notice and Comment Expanded Notice and Comment Period	
Current (1982)	Agency Regulatory Review and Analysis (executive branch) OMB Oversight of Rulemaking (executive branch agencies) Paperwork Budget	Legislative veto (particular programs)	Regulatory Agenda Fiscal Notes	
PROPOSED	Regulatory Budget Agency Regulatory Review and Analysis (all regulatory agencies) OMB Oversight of Rulemaking (all agencies)	Legislative veto (across the board)	FACA exemption Expanded Notice and Comment Period Judicial Review Hybrid Rulemaking	

over federal regulatory decisions and processes than they have had in the past. But, it also shows that the Executive Office of the President is succeeding to a greater extent than the others. State and local governments will have to wait for Congress to enact the "Regulatory Reform Act of 1982" if they are to regain the regulatory access they once enjoyed. Congress may continue to attach legislative vetoes to particular bills, but a generic legislative veto to increase Congressional control over agency rulemaking has yet to be enacted and it would have to survive a likely Constitutional challenge before the courts.

To date, the effects of recent shifts in regulatory power on state and local governments have been mixed. Recent executive branch efforts have decreased the amount of intergovernmental regulation. At the same time, state and local access to federal regulatory policymaking has declined. In combination, these contradictory trends cloud the future of intergovernmental regulation. The absence of meaningful participation by state and local governments in current deliberations about changing existing rules and in the process through which new regulation are promulgated may not affect their prospects for short-term regulatory relief. But neither will it help them shape the course of current and future regulations affecting them.

Counted simultaneously among the most

regulated sectors of the United States and among the primary implementors of federal programs and regulations, state and local governments may be the best source of information available to federal regulators on issues such as administrative feasibility, prospects for a succesful implementation, appropriateness of techniques and equity in cost-sharing. In the end, however, they must be their own best friends as well; in a federal and pluralistic system of government, states and localities must depend upon themselves to shape regulations affecting them. They cannot rely upon the altruism of the federal government.

FOOTNOTES

[1] Eugene Bardach and Robert Kagan, *Social Regulation: Strategies for Reform* (San Francisco: Institute for Contemporary Studies, 1982), p. 3.

[2] Paul MacAvoy, "Preface," in *Unsettled Questions on Regulatory Reform* Paul MacAvoy, ed. (Washington, DC: American Enterprise Institute for Public Policy Research, 1978), p. 1.

[3] "Reining in the Regulators: A Fast Administration Start to Cutting Back on Washington's Red Tape," *Time*, June 15, 1981, p. 62.

[4] "Still a Promise," *Regulatory Eye*, June 1981, pp. 1–2.

[5] Timothy Clark, "Substance Over Process," *National Journal*, January 3, 1981, p. 28.

[6] Congressional Research Service, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues Raised by Executive Order 12291* (Washington, DC: U.S. Government Printing Office, 1981), p. 1.

[7] According to a Congressional Research Service analysis of rulemaking reform measures:

> The Supreme Court's initial reaction to this Congressional practice was to invoke the nondelegation doctrine, striking down New Deal legislation which it found failed to constrain Presidential authority within reasonable limits. *Panama Refining Company v. Ryan,* 293 U.S. 388 (1935), *Schechter Poultry Corporation v. United States,* 295 U.S. 495 (1935). After that, in the face of continued such delegations, the courts have interpreted the standards requirement as meaning only that a statute, its explicit or reasonably discernable purposes, or the administrative practices under it, taken together, must provide the administration with sufficiently clear guidelines that a court reviewing the administrator's action can "ascertain whether the will of Congress has been obeyed." *Ibid.*, p. 8.

[8] Harold Seidman, *Politics, Position and Power: The Dynamics of Federal Organization* (New York: Oxford University Press, 1980), p.3.

[9] Larry R. Jones and Charles V. Maichel, "Regulatory Review Alternatives for State Government," Wallace School of Community Service and Public Affairs, University of Oregon, June 1981, (xeroxed), p. 2.

[10] In this regard see President Ford's EO 11821, "Inflation impact Statements," (White House, November 27, 1974), extended through December 31, 1977, by EO 11949, "Economic Impact Statement Program," (White House, December 31, 1976; this was expanded by President Carter's EO 12044, "Improving Government Regulations," (White House, March 23, 1978), Part II "Improving Government Regulations, Proposals for Implementing EO 12044," Commerce Department 23170, Department of Health, Education and Welfare 23119, Renegotiation Board 23197, Water Resources Council 23199, "Use of Cost Benefit Analysis and Other Such Similar Analytical Methods of Regulation," *Federal Register* 44:45, (March 6, 1979), p. 12198; see also President Reagan's EO 12991, "Regulation," (February 19, 1981), and Office of Management and Budget, "Interim Regulatory Impact Analysis Guidance," June 13, 1981.

[11] A forerunner of the Ford program was OMB's "Quality of Life" review process during the Nixon Administration. Theoretically, it applied to all agencies with jurisdiction over environmental quality, consumer protection, and occupational health and safety, but in practice reviews focused almost exclusively on EPA regulations. The process involved interagency review of proposed regulations prior to issuance for public comment and again before promulgation in final form. OMB acted as coordinator; the review itself consisted of routing draft regulations to all interested agencies for comment. Questions raised by the review process were submitted to staff level meetings. Under this procedure, OMB controlled whether additional time for completion of agency review would be required and whether additional meetings would be held to resolve disputes. Disputes not satisfactorily resolved at the staff level occasioned further meetings presided over by OMB and often attended by White House staff.

[12] Agencies were required to certify that a proposal was nonmajor in impact and, additionally, they could be required to justify their classification.

[13] At the outset, only a summary of the economic impact statement was required. When the Wage Council discovered that many agencies were submitting major regulations without actually preparing the required analysis and others were submitting only a pro forma summary, the procedure was changed to require the submission of the document as well as the certification and proposed rule.

[14] Section 3(a) of the *Council on Wage and Price Stability Act of 1974* (PL 93–387) as amended by PL 94–78, 12, U.S.C. 1904 note directs the council to: (a) review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purposes of determining the extent to which those programs and activities are contributing to inflation; and (b) intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcome of such proceedings.

[15] Interview with Thomas D. Hopkins, then acting assistant director for government operations and research, Council on Wage and Price Stability, cited in Kathryne Burnick, "The Inflation Impact Statement Program and Executive Branch Coordination," Washington, DC, The American Bar Association, Commission of Law and Economy, May 18, 1977.

[16] Jones and Maichel, "Regulatory Review Alternatives," p. 8.

[17] James Miller, "Lessons of the Economic Impact Statement Program," *Regulation*, August 1977, p. 18.

[18] Of the total 65 economic impact statements reviewed during the two years, 57 were regulatory proposals and therefore fell under the purview of the Wage Council.

[19] Larry R. Jones and Fred Thompson, "Fighting Regulation: The Regulatory Review Process," *California Management Review* 28 (Winter 1980), pp. 5–19.

[20] The Carter Administration was also active in the area of paperwork reduction. These efforts are reviewed later in this chapter.

[21] Instead of being required to analyze, weigh and otherwise compare costs and benefits, agencies were required to describe the major alternative ways to regulate, to analyze their economic consequences and to detail the rationale for the selected alternative.

[22] This group was composed of the Chairman of the Council of Economic Advisors, the Director of OMB, and the Secretaries of Commerce, Labor and Treasury.

[23] EO 12044 provided the regulations should (1) be as simple and clear as possible, (2) achieve legislative goals effectively and efficiently, and (3) not impose unnecessary burdens on the economy, individuals, public or private organizations, or state or local governments.

[24] In "A Review of the Regulatory Interventions of the Council on Wage and Price Stability: 1975-1980," Thomas Hopkins concluded that despite the high subjectivity of their analyses, a survey of 31 rulemakings in which CWPS intervened in 1978, "is consistent with the hypothesis that the Council is effective in improving regulations" and "... it is clear that independent economic analysis performed by a centrally located agency can make an important contribution in efforts to improve regulations," (Washington, DC: Council on Wage and Price Stability, 1980), p. vi.

[25] Christopher Demuth, "Constraining Regulatory Costs: The White House Programs," *Regulation*, January 1980, p. 22.

[26] George Eads, "Harnessing Regulation: The Evolving Role of White House Oversight," *Regulation*, May 1981, p. 24.

[27] For critical overview of RARG's role, see Susan Tolchin, "Presidential Power and RARG," *Regulation*, July 1979, pp. 44–49.

[28] DeMuth, "Constraining Regulatory Costs," p. 28.

[29] Thomas Hopkins, Deputy Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, remarks before the Regulatory Reform Panel, National Capital Area Chapter of the American Society of Public Administration Conference, December 3, 1981.

[30] EO 12291, February 17, 1981.

[31] *Ibid*.

[32] The Task Force is chaired by Vice President Bush, and includes as members the Director of OMB, the Secretaries of Treasury, Commerce and Labor, the Attorney General, the Chairman of the Council of Economic Advisors, and the Assistant to the President for Domestic Policy Development. The Director of the Office of Information and Regulatory Affairs (OIRA), Christopher DeMuth, is Executive Director of the Task Force. OMB supplies most of the Task Force personnel.

[33] "OMB Now a Regulator in Historic Power Shift," *Washington Post*, May 5, 1981, p. A1.

[34] EO 12291, Section 3(e)(1).

[35] *Ibid*., Section 3(b).

[36] *Ibid*., Section 6(b)(1), 3(b).

[37] *Ibid*., Section 3(f)(1).

[38] *Ibid*., Section 3(b)(2).

[39] *Ibid*., Section 6(a)(2).

[40] *Ibid*., Section 6(a)(3).

[41] *Ibid*., Section 6(a)(5).

[42] *Ibid*., Section 6(a)(4), (8)(b).

[43] U.S. Congress, House, Committee on Energy and Commerce, *Presidential Control of Agency Rulemaking*, Committee Print, 97th Cong., 1st sess., (1981), p. 15.

[44] EO 12291 returns to the Ford Administration concept of major rule. Section 3(b) of the order describes as major any regulation that is likely to result in an annual effect on the economy of at least $100 million or a major increase in costs to consumers, individuals or state and local government agencies.

[45] The executive order requires slightly different procedures for proposed and final rules. Guidance for the review process is also found in OMB Bulletin 81–13, on reporting requirements under EO 12291, in the *Paperwork Reduction Act*, and in OMB Memorandum M-81-9 on OMB materials to be included in the rulemaking record. See also, *Regulatory Eye*, September, 1981, pp. 5–6.

[46] However, if an NPRM had been previously submitted for OMB review, the final rule submission need only occur thirty days prior to its publication.

[47] Office of Management and Budget, "Interim Regulatory Impact Analysis Guidance," (Washington, DC: Office of Management and Budget, June 13, 1981).

[48] ACIR staff interview with Thomas Hopkins, Deputy Administrator, Office of Information and Regulatory Affairs, November 9, 1981.

[49] EO 12291, Section 3(f)(1).

[50] For example, no cases of this were reported in the first year of program operation. Interview with Deputy Administrator Thomas Hopkins, Office of Information Regulatory Affairs, Office of Management and Budget, cited in *Regulatory Eye*, December, 1981, p. 5.

[51] See Felicity Barringer, "Feud Tests OMB as Regulatory Watchdog," *The Washington Post*, November 26, 1981, p. A 15.

[52] *Regulatory Eye*, January, 1982, p. 3.

[53] U.S. General Accounting Office, *Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Cost of Regulation* (Washington, DC: U.S. Government Printing Office, 1982), p. 3.

[54] "Deregulation HQ," An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller, III, *Regulation*, March 1981, pp. 14–23.

[55] U.S. General Accounting Office, *Improved Quality ... Regulatory Analysis*, pp. 4, 45–59.

[56] Fred Thompson and L. R. Jones, *Regulatory Policy and Practices: Regulating Better and Regulating Less* (New York: Praeger Publishers, 1982), pp. 162–165.

[57] Allen Schick, "The Road to PPB: The Stages of Budget Reform," *Public Administration Review*, (December 1966), p. 243–58.

[58] Cited in U.S. Regulatory Council, *Regulatory Reform Highlights: An Inventory of Initiatives 1978-1980* (Washington, DC: U.S. Regulatory Council, 1980), p. 6.

[59] U.S. Commission on Federal Paperwork, *Impact of Federal Paperwork on State and Local Governments: An Assessment by the Academy for Contemporary Problems* (Washington, DC: U.S. Government Printing

Office, 1977), pp. 6,7.

[60] U.S. Commission on Federal Paperwork, *Final Summary Report* (Washington, DC: U.S. Government Printing Office, 1977), pp. 51, 57, 62.

[61] Office of Management and Budget, *Paperwork and Red Tape: New Perspectives, New Directions* (Washington, DC: Office of Management and Budget, 1979), p. 11. Earlier efforts by the Ford Administration used the *Federal Reports Act* to reduce the number of governmental forms.

[62] While the ICB was first announced in EO 12174, OMB Bulletin 80–11 issued on June 19, 1980 set forth implementing instructions. At the outset OMB requested agencies to submit an ICB for FY 1982 including a 10% reduction in grant paperwork requirements. Far more serious is the requirement that as of December 31, 1981, in fulfillment of the *1980 Paperwork Reduction Act*, any reporting or recordkeeping requirement not included in the OMB inventory on which the ICB is based will not have the force of law.

[63] For a fuller account of the legislative history, see Richard Neustadt, "Taming the Paperwork Tiger," *Regulation*, January 1981, pp. 31–32.

[64] Office of Management and Budget, *Information Collection Budget 1981*, p. 6.

[65] Office of Management and Budget, *Information Collection Budget of the United States Government, Fiscal Year 1982* (Washington, DC: Office of Management and Budget, 1982), pp. 1, 16.

[66] EO 12291.

[67] This description is substantially based on that of L.R. Jones and Fred Thompson in "The Regulatory Budget," presented at the National Conference of the American Society for Public Administration, Detroit, MI, April 13, 1981. See also L.R. Jones and Fred Thompson, "Improving Evaluations of Regulation," *The Bureaucrat* 10 (Fall 1981), pp. 25–31.

[68] New proposals would include activities authorized under prior, separate legislation but not yet funded, and new initiatives advocated by agencies not specifically authorized through prior legislation action.

[69] L.R. Jones and Fred Thompson, "The Regulatory Budget," pp. 29–44.

[70] Aaron Wildavsky has made this point generally with regard to the largely unsuccessful integration of policy analysis into agency decisionmaking in the expenditure budget cycle. See, for example, "The Self-evaluating Organization," *Public Administration Review* (September/October, 1972), pp. 509–520.

[71] On this point see, for example, Christpher DeMuth, "The Regulatory Budget," *Regulation*, March 1980; Richard Fullenbaum and Joseph Kasputys, "The Regulatory Budget: Concepts and Information Requirements," in *Regulatory Reform Seminar: Proceedings and Background Papers* (Washington, DC: U.S. Department of Commerce, October 17, 1978), and L.R. Jones and Fred Thompson, "The Regulatory Budget."

[72] Statement of Harry S. Havens, Director of Program Analysis Division, U.S. General Accounting Office, contained in U.S. Congress, Senate, Committee on Commerce, Science, and Transportation, *Hearings on the Cost of Regulation to the Consumer*, 95th Cong., 2nd sess. (1978), pp. 75–76, cited in Jones and Thompson, "The Regulatory Budget," p. 14.

[73] U.S. Congress, House, Committee on Rules, *Recommendations on Establishment of Procedures for Congressional Review of Agency Rules*, 96th Cong., 2nd sess. (1980), pp. 4–5.

[74] 29 U.S.C. 652(8).

[75] James L. Sundquist, *The Decline and Resurgence of Congress* (Washington, DC: The Brookings Institution, 1981), p. 344.

[76] William Shafer and James Thurber, "The Legislative Veto and the Paradox of Congressional Oversight," paper presented at the Annual Meeting of the American Political Science Association, New York, September 3–6, 1981, p. 25.

[77] Louis Fisher, *The Politics of Shared Power: Congress and the Executive* (Washington, DC: Congressional Quarterly, December 1981), p . 101.

[78] Clark Norton, *Congressional Veto Provisions and Amendments: 96th Congress*, Report 80–86 (Washington, DC: Congressional Research Service, 1981). See also Sundquist, *The Decline*, p. 345.

[79] See, for example, Sen. Harrison H. Schmitt, "Putting Democratic Controls on the Law of Bureaucrats," and Rep. Elliott Levitas, "The Veto as an Exercise in Congressional Responsibility," in *Reforming Regulation*, Timothy B. Clark, Marvin H. Kosters, and James C. Miller III, eds., (Washington, DC: American Enterprise Institute, 1980); see also Sundquist, *The Decline*, Chapter 12.

[80] See, for example, Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," *Regulation*, November 1979, pp. 19–26; Antonin Scalia, "The Legislative Veto: In Violation of the Constitution" in *Reforming Regulation*, Clark, Kosters, and Miller, eds., pp. 55–61; and Schafer and Thurber, "The Legislative Veto."

[81] *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, CA DC, 50 LW 2459 (1982). The U.S. Court of Appeals for the District of Columbia ruled the one house veto unconstitutional. The issue has been appealed to the Supreme Court.

[82] Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism: Restoring Confidence and Competence*, A–86 (Washington, DC: U.S. Government Printing Office, 1981), p. 10.

[83] Advisory Commission on Intergovernmental Relations, "Fiscal Notes for Local Governments," *Information Bulletin* No. 77–1 (Washington, DC: Advisory Commission on Intergovernmental Relations, February 1977).

[84] Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism*, p. 130.

[85] For a discussion of some of the difficulties in implementing this legislation, see Congressional Budget Office, *The Feasibility of Preparing State and Local Cost Estimates: A Report to the House Rules Committee on the State and Local Cost Estimates Act of 1981* (Washington, DC: Congressional Budget Office, November 1981).

[86] Arthur E. Bonfield, "Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts," (Washington, DC: The Administrative Conference of the United States, Committee on Rulemaking, September 1969), p. i.

[87] U.S. Congress, Senate, Committee on the Judiciary, *The Regulatory Reform Act: Report of the Committee on the Judiciary to Accompany S. 1080*, 97th Cong., 1st sess. (1981), p. 51.

[88] 5 U.S.C. Section 553.

[89] See for examples, *Ethyl Corporation v. EPA* 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied 426 U.S. 941 (1976) and *U.S. v. Nova Scotia Food Products Corp.* 568 F.2d (2nd Cir. 1977).

[90] See for examples, *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert.

denied, 417 U.S. 921 (1974) and *International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

[91] U.S. department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (Washington, DC: U.S. Department of Justice, 1947), pp. 27–8.

[92] Arthur Bonfield, "Public Participation," p. 53.

[93] Donald Haider, *When Governments Come to Washington: Governors, Mayors and Intergovernmental Lobbying* (New York: The Free Press, 1974).

[94] For details on these difficulties, see Memorandum from the Advisory Commission on Intergovernmental Relations to Thomas Bertram Lance, Director, Office of Management and Budget, January 30, 1977.

[95] *Center for Auto Safety v. Tiemann*, Civil No. 74–1662 (D.C. Cir. 1976).

[96] For an exhaustive review of these problems see Michael A. Cardozo, "The Federal Advisory Committee Act in Operation," *Administrative Law Review* 33 (Winter 1981): 1–62.

[97] 5 U.S.C. Sect. 4 (1976).

[98] 5 U.S.C. Sect. 4 (1976) provides that:

> Nothing in the act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a federal program, or any state or local commitee, council, board, commission, or similar groups established to advise or make recommendations to state or local officials or agencies.

[99] *Center for Auto Safety v. Tiemann*, Civil No. 74–1662 (D.C. Cir. 1976).

[100] Quoted in Vincent Puritano, Deputy Assistant Director for Intergovernmental Affairs to Wayne Anderson, Executive Director, The Advisory Commission on Intergovernmental Relations, Letter, September 8, 1977.

[101] Vincent Puritano, Letter to Wayne Anderson, p. 2.

[102] Section 401(b) of the *Intergovernmental Cooperation Act of 1968* (PL 90–577) says, in part, "All viewpoints—national, regional, state and local—shall, to the extent possible, be fully considered and taken into account in planning federal or federally assisted development programs . . ." and Sec. 401(b) of the act which says, "Each federal department and agency administering a development assistance program, shall, to the extent practicable consult with and seek advice from all other significantly affected federal departments and agencies in an effort to assure fully coordinated programs." The circular is also in support of the Presidential Memorandum to Heads of Executive Branch departments and agencies of February 25, 1977 requiring consultation with state and local officials on matters which have significant state and local impact.

[103] 409 F. Supp. 473 (D.D.C. 1976).

[104] The process was established on May 23, 1978, by a memorandum to executive branch department and agency heads.

[105] Memorandum from the President, to Heads of Executive Departments and Agencies, Washington, DC, the White House, March 23, 1978.

[106] EO 12044 required agencies to publish an agenda of upcoming regulation each spring and fall in the *Federal Register*. The purpose of such agendas was to give the public adequate notice of upcoming rulemakings. At a minimum, they contained: a summary of each major rule being considered, the objectives and legal basis for it, and a schedule for completing action on proposed major rules: the name and telephone number of a knowledgeable agency official for each item on the agenda; and a list of existing regulations to be reviewed under the terms of the order and a brief discussion of each.

[107] *Ibid.*

[108] Office of Management and Budget, *Improving Government Regulations—Current Status and Future Directions* (Washington, DC: Office of Management and Budget, November 1980).

[109] *Ibid.*, p. 78.

[110] *Ibid.*

[111] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Hearings on S 1663 to Amend the Administrative Procedure Act*, 88th Cong., 2nd sess. (1964).

[112] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Hearings on Bills to Amend the Administrative Procedure Act*, 89th Cong., 1st. sess. (1965).

[113] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Hearings on the Administrative Procedure Act Amendments of 1976*, 94th Cong., 2nd sess. (1976).

[114] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Hearings on the Administrative Procedure Act Amendments of 1978*, 95th Cong., 2nd sess. (1978).

[115] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Hearings on Regulatory Reform*, 96th Cong., 1st sess. (1979) in four parts.

[116] U.S. Congress, Senate, Committee on Governmental Affairs, *Hearings on Regulatory Reform Legislation*, 96th Cong., 1st sess. (1979) in two parts.

[117] U.S. Congress, Senate, (S. 1080), Sec. 3, amending 5 U.S.C. 553.

[118] *Ibid.*, Sections 3(b)(1)(E and F).

[119] Paul R. Verkuil, "The Emerging Concept of Administrative Procedure," *Columbia Law Review* 78 (March 1978), pp. 317–320.

[120] 15 U.S.C. sect. 57a (1976).

[121] 15 U.S.C. sect. 78f(e)(4)(A)–(E), (1976).

[122] 15 U.S.C. sect. 2605 (1976).

[123] PL 95–91, 91 Stat. 565 (1977) (codified at 42 U.S.C.A. Sections 7101–7352). As Verkuil perceives it, the most careful legislative provision for hybrid rulemaking is contained in the *Department of Energy Organization Act*. Under the act, the Secretary is entitled to utilize simple Section 553 notice and comment procedures if he determines that "no substantial issue of fact or law exists;" otherwise "an opportunity for oral presentation of views, data and arguments shall be provided."

[124] U.S. Congress, Senate, Committee on the Judiciary, *Report on the Regulatory Reform Act of 1981*, S 1080, 97th Cong., 1st sess. (1981), p. 123.

[125] *Ibid.*, p. 122.

[126] The Advisory Commission on Intergovernmental Relations, *Improving Federal Grants Management*, A–53 (Washington, DC: U.S. Government Printing Office, 1977), p. 106.

[127] National Governors' Association, "Eliminating Roadblocks to Efficient State Government: Governors' Green Book," Washington, DC, May 12, 1981, p. 12. The ACIR also came to this conclusion in its report, *Improving Federal Grants Management*, p. 114, as did the General Accounting Office in its report, *Fundamental Changes are Needed in Federal Assistance to State and Local Governments*, GG–75–75 (Washington, DC: U.S. General Accounting Office, August 19, 1975).

[128] Advisory Commission on Intergovernmental Relations,

Fiscal Management of Federal Pass-Through Grants, A–102 (Washington, DC: U.S. Government Printing Office, September, 1981).

[129] Advisory Commission on Intergovernmental Relations, "The Joint Funding Simplification Act: A Post Mortem or New Lease on Life," *Information Bulletin*, 80–2, July 1980.

[130] *Ibid.*, p. 4.

[131] Office of Management and Budget, *Managing Federal Assistance in the 1980's: A Report to the Congress of the United States Pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (PL 95–244)*, (Washington, DC: Office of Management and Budget, June 1980), Table 1, pp. A–24–9.

[132] The Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A–52 (Washington, DC: U.S. Government Printing Office, 1977).

[133] *Ibid.*, p. 242.

[134] U.S. General Accounting Office, *Report to the Congress of the United States: Further Improvements Needed in EEOC Enforcement Activities*, HRD–81–29 (Washington, DC: U.S. Government Printing Office, 1981), pp. 40–3.

[135] Since GAO wrote its report, the EEOC has issued final rules for the uniform implementation of equal opportunity provisions of the *Age Discrimination Act*. It has sent proposed rules to implement the *Equal Pay Act* to OMB for review.

[136] Interview with Robert Hobson, Chief, Policy Branch, Office of Federal Contract Compliance Program, Department of Labor, June 15, 1982.

[137] *Ibid.*

[138] Richard A. Liroff, *A National Policy for the Environment: NEPA and its Aftermath* (Bloomington: Indiana University Press, 1976), p. 36.

[139] *Ibid.*, p. 37.

[140] *Federal Register* 35 (March 5, 1970), p. 4247.

[141] *Federal Register* 35 (November 29, 1978), p.55978.

[142] "Relating to Protection and Enhancement of Environmental Quality," *Weekly Compilation of Presidential Documents*, vol. 13, No. 22 (Washington, DC: The White House, May 24, 1977).

[143] *Federal Register* 43 (November 29, 1978), p. 55978.

[144] *Federal Register* 46 (May 7, 1981), p. 25502.

[145] Office of Management and Budget, *Managing Federal Assistance in the 1980s*, Vol. 1, *Working Papers* (Washington, DC: Office of Management and Budget, June 1980).

[146] *Ibid.*

[147] *Federal Register* 45 (November 7, 1980), p. 74416–20.

[148] See, for example, Allen V. Kneese and Charles L. Schultze, *Pollution and Public Policy* (Washington, DC: Brookings Institution, 1975).

[149] These are discussed in the Regulatory Council, *Regulating with Common Sense: A Progress Report on Innovative Regulatory Techniques* (Washington, DC: The Regulatory Council, October 1980).

[150] The Environmental Protection Agency, the Department of Commerce, the Department of Housing and Urban Development and the Department of Transportation, in 1979, awarded grants of up to $500,000 to Boston; Bridgeport-Waterbury; Buffalo-Erie County; Chicago; Elizabeth, NJ; Minneapolis-St. Paul; Philadephia; and Portland. The agencies based selections on the cities' commitment to attain air quality standards, the imaginative quality of their proposals, and the projects' potential to continue after funding stops.

[151] U.S. Regulatory Council, *Regulating With Common Sense*, p. ii.

[152] U.S. General Accounting Office, *Improved Quality, Adequate Resources, and Consistent Oversight Needed If Regulatory Analysis is to Help Control Costs of Regulations* (Washington, DC: U.S. Government Printing Office, 1982), p. 54.

[153] These agendas may be published simultaneously with regulatory agendas of all upcoming regulations required by EOs 12044 and 12291. Regulatory agendas should not be confused with the Regulatory Calendar, which contains detailed information of major rules and is put together by the Regulatory Information Service Center.

[154] Testimony of Frank Swain, chief counsel for advocacy, Small Business Administration, before the House Committee on Small Business. See U.S. Congress, House, Committee on Small Business, *Oversight Hearings*, 97th Cong., 2nd sess. (1982), forthcoming.

[155] Two Senators believed small governments like small businesses were often the victims of federal regulation. Thus, in July, 1978, Senators William Hatlaway (D-ME) and James Pearson (R-KS) offered an amendment to include small governments during subcommittee mark-up of the bill. Senators John Culver (D-IA) and Gaylord Nelson (D-WI), the bill's sponsors, were not averse and the amendment was adopted.

[156] Small governments and their associations can make use of the public comment provisions of the law, however, to pressure SBA's general counsel for advocacy to intercede with agencies on their behalf.

[157] Office of Management and Budget, *Inventory of State and Local Proposals Submitted to the Task Force on Regulatory Relief* (Washington, DC: Office of Management and Budget, November, 1982).

[158] ACIR staff tabulation of rules reported as burdensome by 15 or more associations or individual state or local governments, as indicated in *ibid.*

[159] Presidential Task Force On Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief for State and Local government: A Progress Report*, Washington, DC, August 1982, (Processed), p. ii.

[160] *Ibid.* The report indicates that individual federal agencies completed 11 additional regulatory relief activities benefiting state and local governments.

[161] *Ibid.*, pp. 1, 2.

[162] *Ibid.*, p. i.

[163] *Ibid.*, and Neil R. Pierce and Jay Hamilton, " 'Flypaper Federalism'—States, Cities Want to Shed Rules that Accompany Aid," *National Journal*, September 12, 1981, p. 1639.

[164] "New Federalism's Slow Beginning," *Regulatory Eye*, July 1982, pp. 4, 5.

[165] "The Reagan Administration's First Year," *Regulatory Eye*, January 1982, p. 3.

[166] Robert Crandall, "Has Reagan Dropped the Ball?" *Regulation*, September 1981, pp. 15–18.

[167] Gail Coad, chief of Regulatory Policy Branch, Office of Information and Regulatory Affairs, Office of Management and Budget, Remarks before the Intergovernmental Roundtable of the American Society of Public Administration, National Capitol Area Chapter, Washington, DC, March 21, 1982.

[168] *Ibid.*

[169] Thompson and Jones are especially critical of the effects of budget cuts on agency performance under EO 12291, in Thompson and Jones, *Regulatory Policy and Practices*, p. 243.

[170] Dick Kirschten discusses these different approaches in "Government of Men," *National Journal*, February 1982, p.340.

[171] James P. Carty, Vice President for Regulatory Reform

and Government Organization, National Association of Manufacturers, quoted in Caroline E. Mayer, "Regulatory Campaign Falters," *Washington Post*, August 22, 1982, p. H1.

[172] Marvin H. Kosters and Jeffrey A. Eisenach, "Is Regulatory Relief Enough?" *Regulation*, March/April 1982, p. 26. See also Walter Guzzardi, Jr., "Reagan's Reluctant Deregulators," *Fortune*, March 8, 1982, p. 35.

[173] Crandall, "Has Reagan Dropped the Ball?" p. 17.

[174] Robert Crandall, "Regulation—The First Year: The Environment," *Regulation*, (January/February 1982), pp. 29–30. See also "How the Administration Fumbled Clean Air Reform," *Regulatory Eye*, December 1981, p. 5.

[175] On this subject generally see Claude Barfield, "Unsnarling the Grant System," *Regulation*, September 1981, pp. 37–46.

[176] *Federal Register* 42 (1981), p. 48582. For final rules implementing this objective, see *Federal Register* 42 (1982), p. 29486–93.

[177] Office of Management and Budget, *Information Collection Budget of the United States, Fiscal Year 1982* (Washington, DC: Office of Management and Budget, 1982), p. 16.

[178] Advisory Commission on Intergovernmental Relations, *Block Grants: A Comparative Analysis*, A–60 (Washington, DC: U.S. Government Printing Office, October 1977).

[179] See Thomas J. Madden and Patrick R. Hawkins, "The New Block Grant Program Faces Period of Adjustment in the Courts," *The National Law Journal*, March 8, 1982, pp. 30–31.

[180] *Ibid*.

Chapter 7

Findings, Issues and Recommendations

SUMMARY FINDINGS

State and local governments, like the business sector and private individuals, have been affected greatly by the massive extension of federal controls and standards over the past two decades. These extensions have altered the terms of a long-standing intergovernmental partnership. Where the federal government once encouraged state and local actions with fiscal incentives, it now also wields sanctions—or simply issues commands. The development of new techniques of intergovernmental regulation presents a challenge to the balance of authority in, and the effective operation of American federalism. Just as reform of the burgeoning system of grants-in-aid was a continuing preoccupation of federal, state and local officials throughout the past decades, reform of the new regulatory programs deserves a priority position on the policy agenda of the 1980s.

In this study of *Regulatory Federalism: Policy, Process, Impact and Reform,* the Commission has highlighted and sought to explain the growth and operation of new forms of intergovernmental regulation. The six preceding chapters have identified four major types of regulatory programs affecting state and local governments; examined their legal foundations under the U.S. Constitution; described their origins and development through the legislative process; reviewed problems of rulemaking, administration and enforcement; probed the fiscal and managerial impact of federal regulation on state and local governments; and assessed past and current proposals for regulatory reform.

This review suggests six major summary findings:

- During the 1960s and 1970s, state and local governments for the first time were brought under extensive federal regulatory controls;
- Federal intergovernmental regulation takes a variety of new administrative and legal forms;
- Although the new forms of regulation have been litigated heavily, by and large the federal courts have done little to constrain the regulatory proclivities of Congress or the executive branch;
- The real nature and extent of the impact of federal regulation on state and local governments is still not fully understood;
- Intergovernmental conflict and confusion have hampered progress toward achieving national goals; and
- Past efforts at regulatory reform have given little attention to problems of intergovernmental concern.

Each of these findings is discussed briefly below.

Finding #1

During the 1960s and 1970s, State and Local Governments for the First Time Were Brought Under Extensive Federal Regulatory Controls

State and local governments have become major targets for federal regulation only in the past two decades. Over this period, national controls have been adopted affecting public functions and services ranging from automobile inspection, animal preservation and college athletics to water treatment and waste disposal. In field after field, the power to set standards and determine methods of compliance has shifted from the states and localities to Washington. Many aspects of policy (including budgetary priorities) and administrative procedure (including personnel practices) are now significantly influenced by federal regulatory "mandates."

Chapter 1 of this report, and *Appendix Table 1–A*, tallied 36 major regulatory statutes affecting state and local governments adopted between 1964 and 1978. Examples of the best-known and most controversial include the *Clean Air Act Amendments of 1970*, which created federal air quality and emissions standards; the *Rehabilitation Act of 1973*, which in Section 504 barred all forms of discrimination against the handicapped; and the *National Maximum Speed Law*, which established the 55 mph speed limit. These and the many other regulatory statutes have spawned dozens (or in some cases hundreds or thousands) of specific rules. For example, the bilingual education requirements that have mandated schools to provide native-language classroom instruction to non-English speaking students are simply one set of rules derived by interpretation of Title VI of the *Civil Rights Act of 1964*, which barred racial and ethnic discrimination in federally assisted programs. The numerous requirements prepared by a single agency, the Department of Transportation, to implement Section 504 filled 51 pages of fine print in the *Federal Register*.

The growing and, in most instances, legitimate concern for civil rights, the environment and health and safety issues produced a pattern of intergovernmental regulation that affected some of the most traditionally local of public concerns. It is worth recalling that, in the 1950s and 1960s, it was uncertain whether or not it would be appropriate for the national government to provide even comparatively limited financial aid to public schools. In the intervening period, however, federal requirements have mandated special educational assistance for the handicapped and non-English speaking; required that every school and college be examined for evidence of race and sex discrimination in admissions, coursework, faculty appointments and extracurricular activities; and specified policies regarding the access of parents and students to school records. Meanwhile, the principal financial responsibility for education remains where it always has been: at the state and local levels.

In some other fields, including environmental protection, the federal government has offered very substantial financial aid to help meet new national goals. In this area, however, there has been a sharp reduction in state autonomy—despite statutory declarations that environmental control is, as it has always been, principally a function of state and local government. Over this period, there has been a dramatic tightening of national standards and administrative oversight for water and air pollution control, as well as the extension of federal requirements into such areas as drinking water quality, hazardous waste disposal, endangered species protection and surface mining reclamation. Furthermore, *all* federally assisted projects must be reviewed for possible threats to the quality of the environment. To a considerable degree—and probably inevitably—environmental policy has become national policy, with state and local governments functioning principally as the implementors of programs conceived in Washington and monitored closely by the federal executive branch.

Of course, the federal government is not a newcomer to the regulatory business. As was indicated in *Chapter 3*, the creation nearly a century ago of the Interstate Commerce Commission to oversee the operations and rate-setting practices of major railroads established a pattern for later federal intervention. Beginning with the *Sherman Antitrust Act of 1890*, the government made a permanent commitment to prohibit monopolistic practices while, during the Progressive era (roughly 1901–20), federal controls were extended over a number of additional social and economic fields. A second, and even more far-reaching, wave of regulatory initiatives occurred during the New Deal period (1933–38). Modern controls over truck transportation, radio communications, labor negotiations, and the securities market, among others, date from these years.

The "new social regulation" of the 1960s and 1970s—involving dozens of enactments in such fields as civil rights, consumer protection, health and safety, and environmental quality—was simply a third period of federal regulatory activism. Yet, it also was the most extensive, producing the largest number of new regulatory statutes and agencies, and extending federal controls to a host of new policy fields.

A number of features distinguish this latest round of national regulation from prior enactments. One is the more frequent reliance upon executive branch agencies, rather than independent commissions, to administer regulatory programs. From the standpoint of federalism, however, the most important characteristic of these recent regulatory initiatives is that many have a direct impact on state and local governments. By and large, the federal regulatory statutes adopted in earlier periods were directed toward the private, and especially the business, sector. Many of these statutes preempted state laws, but did not otherwise tamper with their governmental processes or services. In contrast, a large proportion of the newest regulatory measures are aimed at, or implemented by states and localities. Depending upon the area in question, these governments serve as co-regulators or as regulatees.

As *Chapter 3* indicates, it is by no means easy to explain the reason for this shift in orientation. Still, although each statute has its own political and historical peculiarities, a variety of factors have encouraged federal adoption of intergovernmental regulations. First, it is certainly noteworthy that the most recent burst of regulation—like those during the Progressive era and the New Deal—was but one facet of a broader wave of national governmental activism and reform. In each of these three eras, federal expansionism attracted substantial popular and (in many cases) bipartisan political support. The overall climate of opinion during the 1960s and 1970s favored legislative efforts to deal with a broad array of social, economic and environmental problems—though opposition to rising taxes, deficits and federal bureaucracy began to mount by the mid-1970s. Congress, because of the changes in its composition, organization and procedures, ceased to be the burying ground for new domestic initiatives. Instead, it rivaled the presidency as their source. The adoption of new regulatory measures, then—like the parallel adoption of a host of other types of federal programs—in part reflected these more general trends.

Secondly, by the 1960s, intergovernmental relations had become established as the principal way by which the federal government conducts its domestic business. While earlier views had stressed the independence of national and state governments, since the New Deal there had been a slowly building consensus that "cooperative federalism" was the most desirable way to provide domestic services. Just as most of the expenditure programs adopted during this period used intergovernmental mechanisms—with Medicare being the principal exception—many of the regulatory programs also relied upon state and local governments to achieve national goals.

Finally, several additional factors in this period combined to make regulatory programs an acceptable or even attractive way for the federal government to carry out its policies. The following might be included:

- Historically, the proper scope of the national government's activity has been an overarching political concern, and proposals for expanding national authority have excited opposition and close scrutiny. During the 1960s, however, federal participation in most areas of state and local governmental responsibiltiy was established. Once the legitimacy of a federal role was accepted, tougher and more coercive regulatory policies often were regarded as simply modifications and extensions of past policies, rather than as major new undertakings.
- Deep-seated and legitimate national concern about continuing discrimination against blacks in the south spurred the passage of several major civil rights statutes in the mid-1960s. Urged by a mobilized public and sanctioned by the Supreme Court, civil rights legislation set a strong precedent for the adoption of regulatory measures benefiting other minority groups or advancing other national goals.
- Because regulatory programs were comparatively new and untested, they enjoyed broader political acceptance than alternative policy strategies. Experience during the "Great Society" had created something of a backlash against the continuing proliferation of categorical grants-in-aid, while the budgetary pressures that mounted during the Viet Nam war and the "stagflation" of the 1970s worked against enacting major new spending programs. In contrast, neither Presidents, nor Congress, nor state and local governmental organizations consistently took a strong stand against extensions of federal regulatory authority.

Finding #2

Federal Intergovernmental Regulation Takes a Variety of New Administrative and Legal Forms

Although the preceding finding stressed the recent growth of federal intergovernmental regulation, from another point of view state and local governments have not been entirely free from federal control for many decades. What most certainly has changed, however, is the form and scope of federal regulation.

For over a century, Washington has offered categorical aid—first in land grants, later in cash—to aid state performance of specific activities deemed to be in the "national interest." By accepting federal matching grants, state and local governments were bound to observe certain national program standards and to submit evidence (in the form of plans, applications and audits) that federal funds had been used properly. The growth of administrative and programmatic conditions has kept pace with the increase of federal dollars. Here, as elsewhere, "there is no such thing as a free lunch."

Often, federal aid conditions were regarded by grant recipients as onerous and objectionable, rigid or ridiculous. Complaints about red tape multiplied in the 1960s as assistance was extended to many new fields and the number of separately authorized categorical grants mounted. Pressures arose for grant consolidation and simplification of management procedures. Yet, though some adjustments were made, federal officials (and certainly the courts) could respond to protests with a "take it or leave it" posture. In principle, at least, grant recipients were free to reject federal aid if they regarded the paperwork and control as excessive. Indeed, many localities and some states did avoid "entangling alliances" with Washington when their financial circumstances allowed. Thus, despite proliferating conditions, the overall emphasis in grant-in-aid programs was on the "carrot" of subsidization, not the "stick" of regulation.

This emphasis began to change in the late 1960s and 1970s. In such fields as environmental protection, there had been a progression from research and development programs, through steadily increasing grant outlays, to tough national air and water quality standards. Where the federal government had previously encouraged states to plan for the orderly development of health care services, it now mandated the creation of state and local cost control systems. Although Washington had previously assisted schools in providing bilingual education to the non-English speaking and special education for the handicapped, in the mid-1970s it required them to provide far more extensive services.

Ironically, many of the most far-reaching regulatory programs were adopted between 1969 and 1976, the same period when the "New Federalism" of the Nixon and Ford Administrations was at its height. On the one hand, political attention was focused on proposals to adopt General Revenue Sharing and several "special revenue sharing" block grants, all intended to reduce federal strings and controls. But at the same time, in other fields, federal regulation was being tightened significantly.

As described in *Chapter 1*, the new intergovernmental regulation took four major forms. It included *direct orders*, which are usually backed by civil or criminal penalties; *crosscutting requirements*, which apply to many or all federal assistance programs; *crossover sanctions*, which threaten the reduction or termination of aid for some purposes unless the requirements of another program are met; and *partial preemptions*, which establish federal standards, but delegate administration to the states if they adopt standards equivalent to the national ones.

As the foregoing discussion suggests, the goals of the new regulatory programs were in some instances similar to those of earlier grants-in-aid. What distinguished them from their predecessors is that, through the use of these new techniques, federal requirements became much more difficult to avoid. Such requirements are more coercive than traditional aid conditions because the element of a voluntary contractual agreement between independent governmental "partners" is lost or greatly reduced. They are also often more intrusive, in that they can reach beyond activities for which the federal government has offered aid funds to influence almost any area of state and local activity. These factors distinguish the contemporary concern of state and local officials about federal "mandating" from long lasting complaints about federal categorical red tape and "strings."

Although the new types of federal regulation share these common characteristics, each also poses particular problems for federal-state-local relations. Because direct orders pit the legal authority of Congress against the rights of states, they raise the most serious legal issues and are the only ones of the new techniques that thus far have been limited by the Supreme Court. Crossover sanctions, on the other hand, pose basic questions about the coercive use of the federal government's authority to tax and spend. Crosscutting requirements are difficult to administer because they are subject to confusingly different interpretations by each federal agency and because they often take a back seat, from an enforcement standpoint, to more program-related conditions. Finally, because they envision a co-regulatory role in which the national government is preeminent, programs using partial preemption techniques require a level of cooperation between the states and federal government which rarely has been achieved.

Finding #3

Although the New Forms of Regulation have been Litigated Heavily, By and Large the Federal Courts Have Done Little to Constrain the Regulatory Proclivities of Congress or the Executive Branch

Until the "Constitutional Revolution" of

1937, questions of federal-state relationships were regarded as weighty legal issues. In prior years, the Supreme Court had played a substantial (if largely negative) role in striking down both federal and state statutes deemed improper under the allocation of authority contemplated by the Framers. "Dual Federalism" was basic doctrine, with the states' Tenth Amendment-reserved powers often balanced against the enumerated powers of the Congress. But key decisions during the latter New Deal years declared the Tenth Amendment to be nothing more than "a truism" while the scope of national authority to regulate interstate commerce and to spend for the general welfare was vastly expanded. Thereafter, questions about the powers of Congress vis-a-vis those of the states were regarded as primarily political or policy issues, rather than grave Constitutional concerns. Consequently, the legislative branch—not the judiciary—became the new "umpire of federalism."

Although new federal-state controversies emerged with the growth of federal aid, few of them were placed before the courts during the post-war period. At the same time, key decisions in such areas as race relations, criminal justice, and reapportionment overturned state laws or practices by extending nationally protected individual rights.

The earlier pattern of noninvolvement by the courts in federal-state regulatory conflicts ended in the 1970s. The growth of new national regulatory controls, among other factors, created increasingly adversarial federal-state relations and volumes of litigation. Grantor-grantee disputes exploded as state and local governments challenged administrative decisions and, in some instances, Congressional exertions of legislative authority. Third parties also entered the fray, suing federal agencies for not enforcing requirements and state agencies for not complying with them. Similarly, new and unique uses of the commerce power came under frequent attack for encroaching on the sovereign prerogatives of state governments. The balance of power between national and state governments began to reappear as a legitimate Constitutional concern.

The resulting furor has generated more heat than light, however. For the most part, cases have been decided on narrow grounds and little in the way of basic principles or guidance has emerged. From the standpoint of state and local governments, the courts have offered little protection. In only one instance has a federal statute been found to exceed the proper authority of the national government vis-a-vis the states. Moreover, the courts have usually upheld agency interpretations of federal statutes against challenges by the targets of regulation.

The landmark decision in *National League of Cities v. Usery* in 1976 was the first since the New Deal to find some substantive meaning in the Tenth Amendment. At issue were the 1974 amendments to the *Fair Labor Standards Act*, which extended to state and local government employees federal overtime pay and minimum wage requirements long applied to the private sector. By a 5–4 majority, the Supreme Court held that the statute was unconstitutional in its application to employees involved in traditional governmental functions.

A number of factors have limited severely the practical import of the NLC decision, however. First, the Court established a narrow (and rather opaque) standard for identifying the "traditional" and "integral" activities of state and local governments. It is by no mean clear what other areas—beyond the power to determine the location of the state capitol—are Constitutionally protected attributes of state sovereignty. Secondly, the case addressed only the most infrequently used form of intergovernmental regulation, the direct order. It suggested no limits on any of the other, far more common, types of national mandates.

The *Fair Labor Standards Act Amendments* invited rejection because they so clearly pitted the full coercive power of federal law against a fundamental aspect of state sovereignty—the authority to set terms of employment for public servants. The law offered no alternative to compliance. As a practical matter, it might be contended that the fiscal and legal penalties involved in other kinds of regulatory programs also coerce the states and localities to bow to federal will. Moreover, it also may be argued that, simply because a state is theoretically free to reject or accept a benefit, does not mean that *any* sort of condition attached should be regarded as Constitutional—just as an individual may not be required to forego his or her basic liberties to obtain unemployment compensation or food stamps. Arguments of these kinds, in fact, have been advanced by states in a number of cases, as well as by legal experts.

To date, however, the Court has viewed any sort of requirement that offers states some alternative to participation, regardless of the costs imposed, as essentially "voluntary" in nature and as an exercise of "cooperative" federalism. Notwithstanding hints of change in the Court's 1981 *Pennhurst* decision, grant law still is largely dominated by precepts developed six decades ago—a time when the very limited aid system could more fairly be characterized as simple and "cooperative." Partial preemption programs have been regarded similarly. In the Court's view, if the Congress could fully preempt a field, allowing state participation (under any circumstances) is an act of deference toward state sovereignty, rather than the exertion of power. In short, the NLC doctrine notwithstanding, the growth of intergovernmental regulation over the past 20 years has been largely unimpeded by judicial rejection of novel statutory mechanisms, as *Chapter 2* indicates.

Coupled with these generous interpretations of Congressional regulatory authority have been equally generous judicial assessments of the powers conferred on agencies by regulatory statutes. As a matter of stated policy, the courts generally show "great deference" to executive branch interpretations of legislative intent. Hence, it has been extremely difficult for challengers to establish that particular administrative rules go beyond often ambiguous statutory language. Indeed, when the courts have overturned executive branch actions, they generally have favored more extensive requirements and more vigorous enforcement. The prospect of close judicial scrutiny, in turn, has encouraged federal agencies to "cover their flanks" by drafting tighter and more comprehensive rules.

To cite one prominent example, the Supreme Court has encouraged affirmative action practices which go well beyond the simple ban on job discrimination that Congress seemed to believe it was enacting with Title VII of the *Civil Rights Act of 1964*, as *Chapter 4* indicates. More recently—and after a string of contrary lower court rulings—the Supreme Court upheld federal requirements banning sex discrimination in employment by schools and colleges. In this case, the Court shared the view of the Office of Civil Rights that the broad, declarative statutory language—which states that "no *person* shall, on the basis of sex, be subject to discrimination under any education program or activity receiving federal financial assistance"—applies to faculty and staff, as well as students, in the absence of any clear statement to the contrary. Similarly, it was the courts which gave real substance to the Environmental Impact Statement (EIS) procedure created under the *National Environmental Policy Act of 1969*. Spurred into action by environmental organizations, the judiciary decided literally hundreds of cases in the program's early years, narrowing agency discretion by its exacting interpretation of ambiguous statutory languge.

On the other hand, except in those few areas in which the Supreme Court has made clear pronouncements, the judicial branch does not speak with a single voice. Varying views are often expressed at the district and appellate court level. In some instances, judicial actions have reigned in the scope of federal rules. An important recent example was a U.S. Appeals court ruling that the Department of Transportation's Section 504 regulations exceeded statutory bounds. The 1981 decision meant that transit systems were no longer required to take extraordinarily costly steps to make buses and subways accessible to the disabled. Following the decision, DOT issued rule revisions permitting local governments to use alternative means to meet the transportation needs of handicapped residents.

Though noteworthy, such cases do not alter the appraisal that the judiciary has done little to constrain federal regulation of state and local governments. Indeed, it can be argued that the "liberal" posture of the courts during the 1950s and 1960s signaled a green light for statutory efforts to regulate the states—not only in civil rights, but in other areas as well. But, in the field of intergovernmental relations generally, the Court has been a cautious institution, regardless of reigning ideology. It has adhered passively to precedents established when grants were few, their conditions were reasonable, and rejecting them was feasible, and it has hesitated to overrule the mounting regulatory handiwork of the other two national branches.

Finding #4

The Real Nature and Extent of the Impact of Federal Regulation on State and Local Governments is Still not Fully Understood

As was noted above, the shift from intergovernmental relationships based almost exclusively on grant-in-aid subsidies to one partially based on the new regulatory forms began during the 1960s and continued and expanded in the early 1970s. It was not until recently, however, that the new problems resulting from the growth of federal mandating began to receive much scrutiny from analysts or policymakers at any level of government. Although there have been assessments—of varying quality—of the fiscal, administrative and legal issues posed by some of the principal regulatory measures, only a few of these have attempted to determine the combined impact of such programs on specific jurisdictions or on the nation as a whole. Conceptually and empirically, the analysis of intergovernmental regulation is now about where the analysis of grants-in-aid was 20 years ago: in the exploratory stages.

Research, of course, often lags behind contemporary events. Many scholars and other investigators are slow to recognize new developments limiting the relevance of traditional approaches. Although there is an extensive literature (especially in the fields of economics, public administration, political science and law) dealing with regulatory affairs, most of this research neglects the major role played by state and local governments as the objects and the implementors of federal regulation. Most studies continue to concentrate attention on the problems posed by older regulatory forms that were directed principally at economic issues and the private sector and usually were administered by independent commissions and federal personnel.

Consequently, although there have been several analytical efforts to determine the costs imposed on private businesses by recent federal regulations and to assess the effect of these mandates on the nation's economic performance, there have been no comparable studies of the impact of federal regulation on state and local governments. Aside from a handful of case studies of regulatory impacts on specific localities, most available information is drawn from just two multijurisdictional assessments. Both of these studies were limited in scope and are best described as exploratory in nature. One, prepared by the Urban Institute, examined just six federal regulatory programs in a sample of seven cities and counties. The other, a somewhat more comprehensive assessment prepared by scholars at the University of California, Riverside, collected certain information concerning the fiscal impact of between 38 and 225 federal and state requirements or rules on a sample of five cities and five counties. No study has attempted to determine the fiscal impact of federal regulations on a group of state governments.

Insufficient research effort is not the only reason that regulatory impacts are not fully understood. A variety of conceptual difficulties and methodological problems also makes any assessment of regulatory costs extremely difficult. First, the key concept—the nature of a "mandate" or regulation—has never been agreed upon and various studies have defined it differently.

Secondly, most governments do not maintain their financial accounts in such a way that expenditures can be correlated with particular federal regulations. Because of such data problems, it has been difficult to provide dollar estimates of mandated costs. Moreover, the definition of "cost"—like the definition of "mandate"—is subject to a variety of interpretations. While some case studies attribute all relevant spending to federal requirements, a more sophisticated treatment recognizes that many jurisdictions would provide some level of mandated services independently, even if federal regulations had not been imposed. In this case, mandated costs are the difference between such "preferred" levels of expenditure and those required by federal law. Moreover, actual program outlays do not indicate the full cost of mandates where a jurisdiction is not in complete compliance with federal standards.

Given these difficulties and the small number of jurisdictions for which any sort of cost information is available, estimates of the overall fiscal impact of federal regulation on cities, counties and states would be purely speculative. What data there are, however, do suggest that the fiscal impact varies greatly from jurisdiction to jurisdiction, and can be substantial.

Some idea of both the size and the variation is provided by the Urban Institute's conclusion that annual mandated costs ranged from a total of $6.00 to $51.51 per capita for the six programs in the seven communities studied. Similarly, the Riverside study estimated the combined costs of federal and state mandates to range from 10% of total local expenditures in one jurisdiction to 85% of local expenditures in another. These variations were related to differences among communities regarding prior local policies, demographic composition, levels of compliance and so forth. Their magnitude suggests why extrapolation from one jurisdiction to another is inappropriate.

Although these studies focused chiefly on fiscal issues, they—along with a number of other survey reports and case analyses—also indicate that the nonfiscal "costs" associated with federal regulations appear to be of equal or greater significance than the purely financial burdens. Included here are "administrative costs" or managerial inefficiencies produced by federal regulations; "performance costs" or reductions in related services required to meet regulatory goals; and "authority costs" resulting from federal erosion of the legal and political integrity of state and local governments. State and local officials complain of delays, duplication and paper work which hamper their own regulatory and program efforts. They charge that meeting expensive federal goals may require reducing standards of performance in other areas and in some cases may divert both federal and other resources away from more important objectives. They believe that in certain instances the federal government has exceeded its proper authority, pointing out that if citizens believe all crucial decisions are made in Washington, state and local governments may become unable to discharge their own responsibilities effectively.

Despite these qualifications, there does appear to be a fair amount of agreement among the various impact studies about which regulatory programs have been most burdensome for state and local governments. Top billing in this regard would seem to go to Section 504 of the *Rehabilitation Act of 1973*, a crosscutting requirement providing nondiscrimination protections to the handicapped. Other regulations frequently identified as unusually burdensome are the *Clean Water Act*—which probably imposes the largest financial costs of any single mandate; the Education for *All Handicapped Children Act*, which requires state and local governments to provide a "free, appropriate" education to all children suffering from various disabilities; and the *Davis-Bacon Act*, which requires that employees hired under federal assistance programs be paid a federally determined prevailing wage.

A full assessment of the impact of intergovernmental regulation, however, cannot be gained by considering any or all of these programs in isolation. Rather, as many reports stress, it is the cumulative effect of multiple and sometimes conflicting requirements that has produced the greatest burdens.

Finding #5

Intergovernmental Conflict and Confusion Have Hampered Progress Toward Achieving National Goals

One of the principal lessons of the 1960s and 1970s is that federal intergovernmental programs are prone to performance shortfalls during the implementation phase. Plans that seemed reasonable in the committee rooms and on the floor of the Congress may go awry when statutes are translated into specific rules and projects by a lengthy chain of federal, state and local administrators. Often, the results have been disappointing.

Problems arise for many reasons. A key factor is that programmatic success depends upon joint contributions of time, personnel and financial resources from a host of more or less autonomous organizations and officials. Goals, priorities and procedures often conflict. Because national, state and local governments all possess independent legal authority and are responsible to separate political constituencies, bargaining must be the *modus operandi*. It is not surprising that some national officials see "federalism" as simply another obstacle to getting their jobs done.

In principle, it might appear that programs relying primarily on regulatory mechanisms would be easier to implement than grants-in-aid because they provide greater federal authority or leverage. In practice, however, it may well be that such programs are even more prone to conflict and breakdown. First, in the typical grant program, state and local concerns are mollified to some degree by the welcome extension of federal financial assistance. At the same time, federal policymakers are disciplined by the fact that they must bear a large portion of the costs for achieving national goals. Neither factor applies in many of these regulatory programs; hence, intergovernmental confrontation is a frequent result.

This tension shows in a variety of ways. The operation of many intergovernmental regulatory programs has been marked more by confusion and conflict than cooperation. State and local governments charge that federal rules and procedures are overly prescriptive and unrealistic, and they protest having to devote locally raised revenues to achieving unfunded (or underfunded) national mandates. Often, state and local administrators believe that the inflexibility and delays produced by the federal regulatory process actually hamper effective operation of their own programs. Conflicts also may result from competing national goals, each overseen by separate legislative committees and bureaucracies, or from varying interpretations of the same statutory requirement by a number of different federal agencies. Such tensions impede administration, produce conflict in the political arena, and increasingly have resulted in protracted legal challenges against federal statutes and rules.

In large part because of these tensions, the overall record of achievement for intergovernmental regulation has been disappointing, though positive results have occurred in some individual policy areas. Some of this disappointment stems from overly idealized initial statements of national goals. Examples include the statements of purposes of statutes relating to clean air, eliminating water pollution discharges, purifying drinking water, controlling hazardous wastes, and gauging the environmental implications of federally assisted programs. Civil rights statutes achieved one major objective in desegregating southern schools, but this dramatic success has not been duplicated in many other areas. Critics cite evidence of continuing racial discrimination in employment and note the weak enforcement of antidiscrimination bans in federally assisted programs. A decade after the enactment of a ban against sex discrimination in federally assisted education programs, the position of women and girls in schools and colleges is said to resemble a glass which is half full, or half empty, depending upon one's outlook. The federal aim to assure a free, appropriate education for all handicapped children has not yet been fully realized, while bilingual education programs mandated for all schools have not demonstrated their effectiveness.

In these and many other areas, actual performance has fallen well short of initial goals and expectations. Federal regulatory programs have proven to be slow getting off the ground and difficult to monitor and enforce. Critics frequently question the adequacy of available scientific information for setting realistic, cost-effective standards and deadlines. Some believe that popular disenchantment with government reflects excessive federal reliance on detailed, inefficient or unworkable rules. They call for replacing present regulatory techniques with new and less intrusive techniques for governmental intervention.

A variety of factors seem to have contributed to these shortcomings in federal program performance. First, as has often been observed, the implementation process actually begins with the legislature. If programs are to be operated effectively, operational considerations must be weighed carefuly as statutory mechanisms are designed and statutory language is drafted.

In practice, many of the problems of intergovernmental regulation seem to have their origins in the legislative process, as *Chapter 3* indicates. Often with broad public support and sometimes spurred on by small but vocal and well organized policy constituencies, Congress has adopted some regulatory statutes or provisions quite casually, with little consideration of their suitability to the task at hand. A desire to take a strong, symbolic stance in favor of some popular cause, or in opposition to an undoubted evil, often has taken priority over realistic legislative craftsmanship. Though patterns vary, several important measures glided successfully through Congress without close committee scrutiny, without hearings and without signifiant floor debate. There has been a tendency to rely upon untested techniques or technologies, and to model new regulatory statutes on previously enacted programs designed for other objectives. For example, the crosscutting regulatory device spread rapidly—and often without serious challenge—to a host of other program areas following its use in Title VI of the 1964 *Civil Rights Act*.

Such legislative inattention often means that the most complex, technically challenging, and politically sensitive issues are left to be resolved by the bureaucracy, during the rulemaking stage. Rulemaking—like warfare—is politics by other means. Often the same groups that participated in the legislative fray redouble their efforts and may be joined by other organized interests which recognize for the first time how they may be affected by emerging federal requirements.

Under the best of circumstances, translating a statute into specific, enforceable rules and procedures is a demanding and time-consuming task. But it is made more difficult by the fact that regulatory statutes commonly are either too vague or too specific. At least from the standpoint of the rulemakers themselves, Congress often has provided insufficient guidance as to its actual intent, leaving the key issues to be resolved at the administrative level; or else it runs to the opposite extreme and has been so specific that it forces the adoption of rules that seem quite unreasonable when applied to specific cases, circumstances and jurisdictions. Some statutes combine both flaws, vacillating between rigidity in some provisions and ambiguity in others.

Not surprisingly, the rulemaking process is often protracted, consuming years from the date of statutory enactment and sometimes exceeding legislatively specified deadlines, as *Chapter 4* indicates. From the standpoint of state and local governments, late issuance of regulations often becomes a principal obstacle to effective program management.

Several factors seem to push interpretations of statutory intent toward greater prescriptiveness, greater detail and less flexibility for the regulatees. As was previously noted, some statutes provide little in the way of administrative discretion. Detailed laws necessarily spawn still more detailed and specific rules. Ironically, however, enactment of broad moral imperatives as statements of Congressional goals may also allow little room for any real exercise of judgment or the careful assessment of potential costs, benefits, and pitfalls during the rulemaking process. Program beneficiaries, after all, often have more effective access to the rulemaking process than program opponents—and certainly more than the unorganized public-at-large. Moreover, much modern social and environmental regulation is administered by agencies strongly committed to achieving their regulatory objectives. This pattern of behavior is in sharp contrast with the traditional economic regulatory commissions, which often have been criticized for adopting a "protective" stance vis-a-vis the industry they are charged to regulate.

There also is a natural logic in the regulatory process itself that encourages the adoption of narrow, uniform standards. First, to be enforceable, requirements must be quite specific; to appear fair, they must treat every situation similarly. Yet identical rules, applied under very different circumstances, may produce unreasonable (or even ridiculous) results in some specific cases.

Secondly, rules tend to be written to restrain the worst abuses, targeted at the comparatively few "bad apples," rather than to the usual situation. Yet the burden of complying with the resulting procedures and prescriptions falls on all alike, regardless of past or present performance.

Third, as noted previously, agencies know that they are far more likely to be brought to task by the courts for sins of omission than of commission. Stringent rules are less likely to be challenged successfully, which makes them appealing to necessarily cautious bureaucrats.

Rule-*making*, however, must be distinguished from rule-*enforcement*. The latter, in many respects, seems to be the regulator's weakest suit. Many agencies promise far more in the way of goals, standards and results than they can deliver, even after years of effort. Thus, many develop "Dr. Jekyll and Mr. Hyde" reputations. One set of critics stresses excessive bureaucratic red tape, while another—equally discontented—condemns the lack of compliance. To the latter group, the generally poor agency enforcement records are the principal shortcoming of the entire regulatory process. But to the former, the same lack of enforcement is the only factor that makes tolerable an otherwise unworkable and unreasonable array of rules and requirements.

A number of factors make enforcement difficult. First, the task of monitoring the day-to-day activities of government (and industry) is simply overwhelming. Few federal agencies have been granted the staff resources to inspect or monitor more than a small fraction of their assigned jurisdiction, and a number of regulatory agencies—like other large organizations, public and private—have been plagued by internal management problems that make it difficult for them to make use of even the limited resources they do possess.

From a political and programmatic standpoint, regulatory agencies also are often reluctant to "get tough" with jurisdictions that fail to meet federal requirements. Official sanctions—like cutting off assistance funds—are employed very infrequently. Enforcement actions are apt to be challenged both politically and legally. Aside from their political repercussions, harsh sanctions can do damage to other program goals that may enjoy a higher priority. Federal agencies also realize that, in practice, they could not achieve regulatory objectives without the assistance, support and resources of state and local officials.

Given the marked deficiencies in federal monitoring and enforcement practices, it is fortunate that most state and local governments have willingly accepted, on a more or less voluntary basis, the objectives established by federal regulatory policies. The effectiveness of federal regulatory efforts depends, to a degree not usually recognized, on such factors as the commitment of local leaderhsip and local political support, neither of which can be directly influenced by Washington.

On the other hand, state and local agencies—like their national counterparts—often lack adequate staff and fiscal resources to accomplish program goals. They too are faced with competing needs and pressures. Small jurisdictions, in particular, may lack the requisite expertise to interpret and carry out detailed requirements. Full compliance with federal regulations is facilitated by adequate technical assistance and the timely availability of federal financial aid. Often neither is forthcoming.

In sum, the process of implementing intergovernmental regulations is complex and difficult, offering many opportunities for delay and breakdown. Tensions among federal, state and local officials have been fueled by ill-considered and perhaps unrealistic legislation, overly specific rules, difficulties in monitoring, a poor record of enforcement, and a lack of adequate fiscal and managerial resources at all levels of government. As a consequence, progress has been disappointingly slow and many programs have fallen well short of the ambitious objectives set when they were enacted. To be sure, some advances have been achieved. Moreover, even if all legislation, follow-up regulations, and enforcement had been sensible and sensitive, not all interlevel tension would have disappeared. Clearly, the controversial nature of much of the new social regulation inevitably would have produced conflict, even under the best of drafting and implementation conditions.

Finding #6

Past Efforts at Regulatory Reform Have Given Little Attention to Problems of Intergovernmental Concern

Along with the new wave of governmental regulation, the past decade has seen a considerable increase in the number and scope of proposals for regulatory reform. As the number of rules mounted, federal officials had second thoughts. Though policymakers generally have been unwilling to discard goals or scrap basic legislative handiwork, every President since Gerald Ford has developed strategies to limit the economic and managerial burdens produced by federal requirements. The Congress, for its part, has turned increasingly to such devices as the "legislative veto" in an effort to rein in rulemakers within the executive branch.

However, until quite recently, state and local governments have not benefited significantly from these regulatory reform efforts. Excessive regulation generally has been regarded as a problem of the private sector, not the public one. Past initiatives have concentrated almost exclusively on modifying rules that affect businesses—reducing competition, diminishing productivity or otherwise harming the nation's economic performance. Only since about 1980 have the President and Congress begun to address the peculiar problems posed by federal regulations aimed at (or administered by) state and local governments. This attention coincided with expressions of concern from state and local officials about the double-bind created by growing federal mandates in a period of declining federal aid and a stagnant economy.

In one significant area, state and local officials actually lost ground during this period. In the wake of the Great Society initiatives of 1964–65, President Lyndon Johnson responded to gubernatorial and mayoral protests about mounting administrative "red tape" with a promise that these officials would be consulted by federal agencies before new rules, standards and procedures affecting intergovernmental programs were adopted. This promise took tangible form as Bureau of the Budget circular A–85, promulgated in June 1967. Although the process was not fully successful—neither federal agencies nor state and local government organizations made an adequate commitment—A–85 did provide some official recognition that federal regulations were a matter of concern to governments at all levels, rather than to Washington alone.

In 1976, a variety of legal questions and a changed political climate led to terminating the A–85 consultation procedure. In a sense, the demise of A–85 and its short-lived and ineffectual successor, EO 12044, symbolized the status of state and local governmental officials in the eyes of the federal regulators: nothing special. Despite increasing reliance on state and local governments to carry out national directives, throughout the 1970s little attention was given to the problems of an increasingly intergovernmentalized regulatory system.

This situation began to change in 1979 and 1980, perhaps because of the increasingly vocal protest against costly federal mandates from officials of hard-pressed cities and states. In the latter year, Congress included in the *Regulatory Flexibility Act* provisions intended to make it easier for small governments, as well as small businesses, to comply with federal requirements. During the same period, President Carter urged the U.S. Regulatory Council to help agencies devise new and innovative techniques for making federal regulation less burdensome and more effective. The Office of Management and Budget published a comprehensive study of crosscutting requirements and proposed a guidance circular aimed at improving their management on a government-wide basis.

Immediately after his inauguration, President Reagan launched a bolder and more comprehensive set of "regulatory relief" initiatives. Major actions included a temporary freeze on a number of pending regulations; creation of the Task Force on Regulatory Relief, chaired by the Vice President and charged with reviewing both new regulatory proposals and existing rules; and development, under EO 12291, of a regulatory analysis procedure intended to minimize the costs imposed by newly adopted rules. These cost-benefit assessments are prepared by executive branch agencies, but the Office of Management and Budget was given unprecedented authority to monitor and review agency actions.

Although this deregulation drive, announced in conjunction with the President's "economic recovery program," was directed principally toward the private sector, it contrasts with earlier efforts in the amount of attention given to regulatory problems of intergovernmental concern. Unlike its predecessors, EO 12291 called for the analysis of rules likely to result in "a major increase in costs or prices for . . . federal, state, or local government agencies." The Bush task force solicited and obtained proposals for rule revisions from the seven major public interest groups representing state and local governmental officials, as well as from a number of individual states, counties, cities and regional planning organizations. During 1981–82, some 119 specific rules were designated by the task force for review and possible modification by executive branch agencies. Of these, it was estimated that about one-quarter were of an intergovernmental character.

Although the rule-revision process faces the obstacles of bureaucratic inertia, political opposition, and judicial scrutiny, actions have been initiated to revise a number of major regulations affecting state and local governments. These include bilingual education requirements, standards affecting mass transportation for the handicapped, *Davis-Bacon* prevailing wage rules, and surface mining reclamation standards. In addition, the Office of Management and Budget asserted its expanded power in the rulemaking process to cut to the "bare bones" minimum regulations drafted by agencies to implement the nine recently enacted consolidated block grant programs.

On the legislative side, Congress in 1981 adopted the *State and Local Cost Estimate Act*, which requires the Congressional Budget Office to prepare a "fiscal note" estimating the potential costs of significant bills reported by committees. This procedure, recommended by the ACIR in a previous study, is intended to assure that Congress is aware of any substantial costs that new legislation may impose on states, cities, counties and other jurisdictions.

Also noteworthy was the passage by the Senate in March 1982, of the Laxalt-Leahy "Regulatory Reform Act." The act, which would provide for the first comprehensive reworking of the *Administrative Procedure Act* since its adoption 36 years ago, includes several provisions of direct benefit to state and local governments. Its passage, by a unanimous 94–0 vote, also shows the current popularity of the regulatory reform cause.

These recent actions and proposals suggest that Washington is belatedly becoming aware of the intergovernmental dimensions of regulatory problems. It remains to be seen whether the present momentum will continue and build. The Administration's actions to date have been achieved almost entirely by administrative means; it has attempted to move few revisions of major regulatory statutes through the hurdles and obstacles of Capitol Hill. Such key measures as the fiscal notes procedure are just beginning to be implemented, while potential benefits of the *Regulatory Flexibility Act of 1980* have yet to be realized.

Finally, past experience suggests that drives for "regulatory reform" and such procedures as cost-benefit analysis, though helpful, do not eliminate the need for a principled approach to problems of both regulation and federalism. The nation has yet to formulate a sense of appropriate federal-state-local roles to guide the development of less intrusive and more effective forms of regulation.

Part A

POLICIES AFFECTING ALL FORMS OF FEDERAL INTERGOVERNMENTAL REGULATION

Historically, joint federal-state activities have been primarily cooperative in nature. When the national government has sought to stimulate state or local interest in a certain problem or to obtain joint participation in a federally inspired venture, it has relied upon inducements in the form of grants or subsidies to elicit collaboration. Federal guidelines and restrictions, when they were promulgated, were closely tied to each specific subsidy. More coercive forms of federal action—such as regulation—were directed almost totally to the private sector.

In recent years, however, the Commission finds that there has been unprecedented growth of federal rules affecting state and local governments and a proliferation of new and increasingly coercive forms of federal intergovernmental regulation. These new forms include crossover sanctions, partial preemptions, direct orders and crosscutting requirements, discussed earlier in the *Findings* and at greater length under *Part B*. This new pattern of intergovernmental regulation represents a primary source of interlevel conflict and tension which, if unchecked, may erode the American concept of cooperative federalism. The Commission also finds that many of these regulations have been enacted by Congress and implemented by executive agencies with insufficient attention devoted to the proper division of federal-state-local responsibilities in each given field of jurisdiction and to the economic and noneconomic costs imposed on state and local governments. Therefore . . . .

Recommendation A.1

Principles Concerning Federal Regulation of State and Local Governments

The Commission recommends that Congress and the Administration carefully consider the appropriate allocation of responsibilities

among the different levels of government when establishing new regulatory programs or when evaluating existing ones. As a general principle, the Commission strongly recommends that the federal government strive to confine its regulation of state and local governments and their legitimate activities to the minimum level consistent with compelling national interest. Enactment of federal intergovernmental regulation may be warranted under the following circumstances:

1) to protect basic political and civil rights guaranteed to all American citizens under the Constitution;

2) to ensure national defense and the proper conduct of foreign affairs;

3) to establish certain uniform and minimum standards in areas affecting the flow of interstate commerce;

4) to prevent state and local actions which substantially and adversely affect another state or its citizens; or

5) to assure essential fiscal and programmatic integrity in the use of federal grants and contracts into which state and local governments freely enter.

The Commission emphasizes, however, that these criteria do not justify every federal regulatory action that has a tenuous relationship to one or more of these principles. Rather, federal intergovernmental regulation is warranted only when a clear and convincing case has demonstrated both the necessity of such intervention and a marked inability of state and local governments to address the regulatory problem involved. In making this determination, the Commission strongly believes that the criteria above must be weighed against the federal government's commensurate responsibility to maintain the viability of the federal system and to respect the institutional integrity of states and their localities.

If, according to this test, the federal government's involvement in a regulatory program is appropriate, the Commission further recommends that the federal government choose the least intrusive means of intergovernmental regulation consistent with the national interest, allowing state and local governments the maximum degree of flexibility permissible.

This recommendation is prompted by the dramatic expansion of federal programs regulating state and local governments in recent years. Of the 36 significant intergovernmental regulatory programs currently in operation, 25 were enacted in the 1970s.[1] Accompanying this rapid increase in numbers of programs has been a proliferation of new and increasingly intrusive methods of federal involvement into the traditional affairs of state and local government. Some believe that the most intrusive of these newer regulatory devices threaten to convert agencies of state and local government into virtual administrative arms of the federal government.[2]

Despite their departure from historic practice, *Chapter 3* in this volume has demonstrated that many of these regulations were adopted by Congress with little consideration for the proper allocation of responsibilities in the federal system.[3] In fact, several federal intergovernmental regulations were enacted with only superficial Congressional deliberation, including the *National Environmental Policy Act*, Section 504 of the *Rehabilitation Act of 1973*, the *Family Educational Rights and Privacy Act*, and the *Age Discrimination Act of 1975*. All were passed with only vague understanding of their implications by the Congress as a whole, and some were subject to no consideration by Congressional committees whatsoever, originating as amendments offered on the House or Senate floor. Each has since become a concern to state and local officials.

Although some programs have been subject to more careful deliberation in Congress, the rapid expansion of new and more intrusive forms of intergovernmental regulation demonstrates to this Commission that the current framework for determining the federal role in such regulation is ineffective and inadequate. In fact, the last comprehensive attempt to establish criteria governing the allocation of regulatory responsibilities was performed over a quarter century ago by the Commission on Intergovernmental Relations (The Kestnbaum Commission).

The Kestnbaum Commission developed two sets of criteria relating to the division of national and state roles in regulation. First, the commission set forth a series of general guidelines for determining the existence of compelling national interests that could justify federal entry into a new area of activity, be it through regulation, grants-in-aid, or direct national performance.[4] Some of these general guidelines remain highly relevant today and are reaffirmed by the ACIR in several of the principles contained in this recommendation.

Second, in its recommendations aimed specifically at regulatory policy, the Kestnbaum Commission identified the following principles for guiding the division of intergovernmental regulatory roles:

> **First**, the fact that the national government has not legislated on a given matter in a field of concurrent power should not bar state action.
>
> **Second**, national laws should be so framed that they will not be construed to preempt any field against state action unless this intent is stated.
>
> **Third**, exercise of national power on any subject should not bar state action on the same subject unless there is positive inconsistency.
>
> **Fourth**, when a national minimum standard is imposed in a field where uniformity is not imperative, the rights of states to set more rigorous standards should be carefully preserved.
>
> **Fifth**, statutes should provide flexible scope for administrative cessions of jurisdiction where the objectives of the laws at the two levels are substantially in accord. State legislation need not be identical with the national legislation.[5]

These principles are less helpful in reforming modern intergovernmental regulation because they apply primarily to the division of federal and state roles in regulating the private sector. They do not address the fundamental issues raised by current programs which entail federal regulation of (1) the way state and local governments regulate nongovernmental activities and (2) the internal operations of state and local governments themselves. The Kestnbaum Commission failed to anticipate these newer, more intrusive forms of intergovernmental regulation, believing that in most instances, "neither level of government may place burdens upon the other."[6]

The ACIR is convinced that developments in intergovernmental regulation since the 1950s have heightened the need to establish a set of criteria that can assist Congress in its deliberations concerning the appropriate scope and methods of federal regulation. It recognizes, however, that such criteria must be broadly framed. No specific principle or recommendation can do justice to the complex circumstances involved in each particular program. Nor can any set of guidelines absolve Congress of its responsibility to exercise discretion and careful judgment in weighing the merits of individual programs.

The first criterion set forth in this recommendation is grounded in protections afforded citizens under the Constitution. Basic civil and political rights established there provide a solid foundation for federal regulations in several fields. For example, Supreme Court decisions since the 1950s have prohibited a broad range of racially discriminatory state practices, based primarily upon the 14th Amendment to the Constitution which reads in part:

> .... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Subsequent Congressional actions protecting civil rights and voting rights of minority citizens through Section 5 of the 14th Amendment, Section 2 of the 15th Amendment, and the Commerce Power have been consistently upheld by the Supreme Court, thus solidifying the strong guarantees against racial discrimination afforded by the Constitution itself. There is now broad consensus in the United States on the general outlines of these basic civil rights protections.[7]

In recent years, similar Congressional protections against discrimination have been afforded to other groups, especially women, older Americans, and the physically handicapped.[8] The courts have been less clear on the degree to which these groups enjoy special protections under the Constitution. In general, specific regulatory implications of these provisions are a matter of some difference of opinion and are subject to further refinement by the Supreme Court. Yet here, too, considerable consensus exists on the fundamental principles involved. For example, the block grants enacted under the *Omnibus Budget and Reconciliation Act of 1981*, which were intended to significantly expand state flexibility in the use of federal funds, explicitly prohibit discrimination in each of the programs on the basis of race, color, national origin, sex, age and physical handicap.[9]

Another basis for intergovernmental regulation is the federal government's responsibility for national defense and the conduct of foreign affairs. Although most defense-related issues do not involve the regulation of state and local governments, certain issues may. For example, the national government over time assumed the power to regulate the state militia and to federalize it during periods of national emergency. The *Emergency Highway Conservation Act of 1974*, which first established the national 55 mph speed limit, and the *National Energy Conservation Policy Act* were also based, in part, on national security considerations stemming from America's reliance on potentially insecure sources of foreign oil. However, the distance between federal regulation of the national guard and energy conservation levels is considerable—a reminder that regulations should be carefully scrutinized by Congress before it accepts a justification on the grounds of national defense or foreign affairs. The federal interest in national security is sufficiently powerful that a danger exists in extending its reach too broadly into state and local affairs.

A third rationale for federal regulation is the need for establishing uniform or minimum standards affecting state and local governments in the regulation of interstate commerce. This criterion has long been used to justify direct federal regulation of private industry. In recent years, this rationale also has been used to justify instances of federal regulation of the way states exercise their police powers over the private sector. In general, these federal regulations have been partial preemptions, through which the national government seeks to regulate an element of the private sector in conjunction with the states. In theory, these are cases where uniform or minimum national standards are sought by Congress—in the interests of public health standards, for example—but where state participation is deemed desirable to permit flexible and responsive implementation and to promote cooperative federal relations. This ostensibly collaborative approach to achieving national standards underlies programs regulating meat and poultry products, surface mining, occupational health and safety, and air and water pollution control, for instance.

Although this approach seems firmly rooted in the Constitution and the theory of cooperative federalism, serious intergovernmental differences have arisen over the structure and implementation of these programs, raising questions about the degree to which they promote intergovernmental cooperation and state and local participation. In addition to administrative problems, the appropriateness and the stringency of national standards also have been contested under certain programs, with state and local governments questioning the ability of national standards to accommodate diverse conditions throughout the country.[10]

Finally, the Supreme Court has identified certain limits to Congress' ability to regulate the states under the Commerce Power. In *National League of Cities v. Usery*, it held that:

> Insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions, they are not within its authority granted Congress by Art. I, sec. 8, cl. 3.[11]

Given these limitations, the Commission emphasizes that any intergovernmental regulation based upon the need for minimum standards in areas substantially affected by interstate commerce must be scrutinized carefully by Congress, as well as the courts, to assure its workability and balance.

A related criterion involves the regulation of state and local actions that adversely affect another state or its citizens in a substantial way. Certain functions, especially in the area of pollution, may become subject to minimum national standards primarily because of these "spillover" effects. As the Senate Committee on Governmental Affairs' *Study on Federal Regulation* observed:

> The increased concern about the environment in recent years resulted in federal legislation aimed at forcing consideration of external costs.... Environmental regulation has the effect of requiring that all or at least a portion of the external costs be sustained by the regulated sector.[12]

On the other hand, certain forms of pollution do not produce substantial interjurisdictional spillovers of this type. For example, noise pollution affects only a limited area. Accordingly, there has been debate in Congress over the appropriateness of national noise pollution standards, although certain manufacturers have supported uniform standards, not on the basis of spillover effects, but to avoid varied state and local restrictions.[13] The Commission believes that external costs must be substantial and resistant to reduction by nonfederal means to justify federal intergovernmental regulation.

The fifth criterion of federal regulation advanced in this recommendation deals with assuring fiscal and programmatic integrity in federal assistance programs. After abuses in the expenditure of the earliest cash grants, the auditing of federal aid programs became an accepted practice by the 1930s. At a minimum, audits have been required to assure that there has been no misappropriation of grant-in-aid funds, including individual malfeasance and the use of funds beyond the legal confines of the act. This level of national supervision generates little controversy today. It is firmly rooted in the Congressional spending power and is supported by liberals and conservatives alike. Even General Revenue Sharing, the most flexible form of federal assistance, contains basic auditing requirements.

Similarly, a variety of other procedural and programmatic requirements became common features of grant-in-aid programs during the 20th Century. For example, planning, application and reporting requirements are now commonly included. Other procedural provisions, including citizen participation, personnel and administrative standards—plus a host of crosscutting federal requirements—have become familiar features of modern grant-in-aid programs. There is general agreement today among participants in the intergovernmental grant system that some of these programmatic requirements are appropriate in many cases, to assure that program goals are properly addressed. However, opinions differ as to which particular requirements are appropriate in specific programs, and attitudes vary about the necessity of different restrictions over time. In the 1930s, for example, a strong case was made for certain regulations that were highly intrusive, such as merit system and single state agency requirements. Professional and administrative developments in the states today, however, make the current case for such restrictions considerably weaker. Experience with other programmatic requirements, such as detailed planning provisions, suggests that they are both intrusive and usually ineffective, while the proliferation of federal grants has led to frequent conflicts among detailed provisions of separate programs.

Thus, the Commission recognizes that careful balancing is required to assure that generally accepted principles of fiscal accountability and program integrity do not become vehicles for excessive and counterproductive federal intergovernmental regulation. Regulations geared to promoting these principles should be reasonably related to the differing objectives of the grant statutes involved, and the varying sizes and purposes of such grants also should be taken into account.

Although these several criteria help define and illuminate the conditions justifying federal intergovernmental regulation, each suffers its own limitations. The Commission stresses that none can be applied in a boilerplate fashion to justify regulations having a tenuous relationship to the national interest. There can be no substitute for the exercise of sound judgment concerning the merits of federal regulation in each specific circumstance.

The Commission believes that the proliferation of federal intergovernmental regulation in recent years suggests that these five criteria have been indiscriminantly invoked. All but forgotten is the federal government's commensurate interest in maintaining the viability of the federal system and respecting the institutional integrity of the states and their political subdivisions. As the Commission on Intergovernmental Relations put it in 1955:

> The national government has therefore a double duty: to protect and promote the national interest . . . under the powers delegated to the national government; and to protect and promote the national interest in the preservation of the federal system. The proper discharge of this dual responsibility calls for vigorous and effective national action where national action is required and, along with this, a discriminating sense of when not to act.[14]

No institutional arrangement created under the Constitution is more fundamental than our federal system. For the Founders, federalism was a primary expression of the concept of separated powers. The geographic division of authority was regarded as a vital element of constitutionally limited government. Equally important, a healthy federalism was regarded as a positive vehicle for promoting and refining popular representation.

Recent experience has reaffirmed that the federal government cannot effectively administer or even closely monitor the entire range of domestic federal programs acquired during the last quarter century. It is heavily dependent upon strong and viable state and local governments to implement the great array of cooperative federal programs and to fulfill their traditional responsibilities, thus keeping additional services from being assigned to an already overloaded central government.

The Commission believes emphatically, therefore, that the Congress should consider with the utmost care its decisions to launch new functional undertakings or to place further mandates on already overburdened state and local governments. The national government need not undertake every regulatory initiative in which some federal purpose can be invoked. According to the Senate Committee on Governmental Affairs' *Study on Federal Regulation:*

> Simply because a problem exists and, in theory, is remediable, does not means that regulation or other government intervention is desirable. Controls should be undertaken where there is a clearly identified problem that cannot otherwise be solved, and where the anticipated achievements are significant and not vitiated by projected adverse consequences.[15]

Equally important, a finding of inadequate performance on one of these criteria by one or a handful of states does not necessarily warrant nationwide regulation. Rather, a clear and convincing case is required to demonstrate that every contemplated federal intergovernmental regulation serves an overriding national interest that cannot be adequately achieved by states acting individually or collectively or by noncoercive means.

This test for balancing competing national interests can be applied to existing federal regulations as well as to proposed ones. On the basis of the criteria outlined above, the following regulations should be subjected to particular scrutiny:

- **Highway Beautification Act of 1965** (PL 89–285): Are its mandates justified by the criteria of compelling national interest?
- **Age Discrimination in Employment Act** as amended by the **Fair Labor Standards Act Amendments of 1974** (PL 93–259): Does national interest in this area outweigh the level of intrusion into integral and traditional functions of state and local governments?
- **Federal-Aid Highway Amendments of 1974**. (PL 93–643): Do national defense considerations justify continued mandating of a 55 mile-per-hour speed limit? Do additional considerations of public safety and energy conservation provide sufficient justification for continued federal mandating?

- **Davis-Bacon Act** (PL 74–403): In light of economic changes, implementation problems, and high costs, is continuation of the act justified by the five principles above?

This recommendation requires that in areas where federal regulation is deemed appropriate, the least intrusive means of regulation should be employed consistent with the national interest. In many instances of federal intergovernmental regulation, state and local governments accept the goals of regulation but dispute specific methods for achieving it.[16] A poll of local elected officials conducted by the National League of Cities found that 48% believed the basic goals and objectives of mandates are desirable, while only 15% disagreed. But 70% sought more flexible standards and procedures which took account of local conditions.[17] Two examples of this point have been the regulations promulgated under:

> *Section 504 of the Rehabilitation Act of 1973*, and *Bilingual Education Requirements*.

Section 504 of the *Rehabilitation Act* prohibits discrimination against the handicapped in federally assisted programs. Fifty-three percent of mayors responding to the NLC poll maintained the cost of accessibility requirements for handicapped persons outweighed the public benefits.[18] In its response to a study by the National Association of Counties, Dade County, FL, maintained that requirements for retrofitting current transit systems to serve the handicapped were not just costly but technically impossible.[19] Instead, many local communities have sought the freedom to implement alternative means of serving the transportation needs of handicapped citizens. This view was upheld by the U.S. Court of Appeals for the District of Columbia, which ruled that specific and burdensome regulations that require extensive modifications of existing transit systems "exceed the Department of Transportation's authority to enforce Section 504."[20] Consequently, the Transportation Department issued new regulations granting federal aid recipients considerably more latitude in selecting the means with which they comply with nondiscrimination requirements in transportation.[21]

Consistent with the spirit of this recommendation, similar flexibility might be extended in other areas as well. In *Lau v. Nichols*, the Supreme Court required that local school districts provide special assistance to non-English-speaking students. Subsequent regulations issued by the Department of Education specifically required providing bilingual education services to such children, including instruction in each student's native language, in place of other educational techniques preferred by certain school districts. This specific procedure was not mandated by the Court, however, and a review of research on alternative methods of instructing non-English-speaking students conducted by the Education Department indicated that bilingual education was often not the most effective technique.[22] Consistent with both the Court's ruling and America's traditional reliance on local decisionmaking in education, this recommendation's emphasis on nonintrusive and flexible requirements suggests that the Department of Education should give careful consideration to allowing individual states and local school districts greater discretion in selecting special education methods.[23]

Other programs which merit scrutiny for their degree of institutional intrusion and prescriptiveness include provisions of the *National Health Planning and Resources Development Act of 1974* and the *Clean Air Act Amendments of 1972*. Specific proposals relating to these programs are examined in subsequent recommendations.

Although this recommendation deals with general principles having broad political and philosphical acceptance, the Commission recognizes that the approach advanced here is not universally applauded. Skeptics may question the utility of this recommendation on three related grounds.

First, the effectiveness of delineating broad principles to govern the federal regulatory role may be questioned. Pragmatists would argue that this approach to limiting intergovernmental regulation will produce few practical results. The Kestnbaum Commission did an admirable job of establishing intergovernmental principles in 1955, yet federal regulation and intrusion still grew enormously. To recommend that Congress should use careful judgment in its intergovernmental regulation is to beg the question, argue skeptics. The real problem is getting Congress to apply appropriate criteria to specific pieces of legislation.

Secondly, difficulties may be encountered in operationalizing these principles. These precepts are difficult to apply with precision in specific circumstances and different principles, on occasion, may conflict.

Third, some argue that limited resources should focus on reforming governmental processes in ways that will reduce regulatory burdens, not on a set of abstract principles. Specific cases must be considered on their individual merits; hence, structuring a process to accomplish this result is the only productive path to reform.

In making this recommendation, the Commission is not unaware of the difficulty of the task or the need to address specific regulatory problems. Many issues are addressed more specifically in following recommendations. But the Commission believes that Congress needs to be reminded of its responsibilites for respecting and maintaining the federal system, and that it may welcome a set of general principles to assist it in its deliberations. Moreover, the Commission firmly believes that the problem of over-regulation has philosophical roots that are addressed by this recommendation. Without guiding principles, mere expediency will carry the day. This Commission maintains that the nation has experienced far too much expediency in the regulatory field, with increasingly negative consequences.

Recommendation A.2

Assuring Adequate Funding for New Federal Regulatory Statutes;*

The Commission finds that many governmental regulations impose substantial costs on state and local governments and constitute a major source of intergovernmental tension and conflict. Furthermore, the lack of adequate resources may seriously undermine successful program implementation and delay or obstruct attaining important national goals. Consequently, the Commission applauds the enactment of the *State and Local Cost Estimate Act of 1981*, implementing a 1980 ACIR recommendation to establish a fiscal notes process in Congress. To further address the problems of mandate funding,

The Commission recommends that Congress establish a system that guarantees full federal reimbursement to state and local governments for all additional direct expenses legitimately incurred in implementing new federal statutory mandates, including costs imposed by federal direct order mandates, crosscutting requirements, partial preemptions and provisions enforced by crossover sanctions.

The Commission further recommends that the legislation establishing such a system specify that no state or local government be obligated to carry out a federal statutory mandate that does not fulfill this requirement.

Obtaining adequate funding to meet the costs imposed by federal mandates has become an issue of major concern to most state and local governments. Although precise data are unavailable, research shows that such costs can be substantial.[24] Moreover, *Chapter 4* demonstrates that the absence of adequate funding has hindered effective implementation of many regulatory programs. Although many proposals for dealing with these problems have been made, such responsies generally fall within three basic strategies: federal reimbursement of all mandated costs, federal reimbursement of selected costly mandates, and federal responsibility for no mandated costs beyond what is currently provided on an ad hoc basis through existing grants.

FULL FEDERAL REIMBURSEMENT

The most far-reaching remedy is full federal reimbursement of all additional costs imposed on state and local governments by federal intergovernmental regulations.[25] Above all, this approach constitutes a statement of principle: that the national government bears a responsibility to fund whatever duties and requirements it chooses to impose on state and local governments.

This position has been strongly endorsed by many state and local government officials, both individually and collectively. For example, the

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*Senator Durenberger requested to be recorded as opposing this recommendation on the grounds that a selective, not a full, reimbursement policy is the only one that is currently realistic and fiscally responsible.

State and Local Coalition, made up of leaders of the major public interest groups, endorsed mandate reimbursement in 1981 as one of the central "principles and priorities for partnership federalism."[26]

The principle of full reimbursement may attract even more support in coming years as fiscal stringency at all levels of government threatens to exacerbate existing problems of unfunded mandates. In fact, there are those who argue that the increasingly stringent federal budget already has been a factor in the current proliferation of federal regulations. As former HEW Secretary Joseph Califano put it, Congress wants to "hav[e] its cake and [eat] it too" on the mandate issue by responding to social problems without bearing the costs.[27]

Requiring full federal reimbursement of mandates would work to slow further regulatory proliferation. In a period of federal deficits, such a requirement would pose an obstacle to new enactments. Significantly, legislation was introduced in the 97th Congress with the dual aims of limiting federal budget outlays under the *Congressional Budget Act of 1974* and of requiring compensation to states and localities for any future costs imposed through federal regulations.[28] Although the bill was not enacted, it suggests the potential for subjecting federal regulations to the discipline of the budget process.

In addition to curbing excessive regulatory growth and providing fiscal relief to state and local governments, full funding of federal mandates would improve the effectiveness of national policies. In the *Clean Water Act*, for instance, one source noted that "the rate of cleaning up municipal water pollution depends almost completely on the availability of federal money."[29] In addition, where underfunded regulations take the form of grant conditions, the effect may be to undermine the objectives of the grant program to which they are attached. For example, Richard Cappalli has observed that:

> When Section 504 was enacted, Congress was informed that the measure would have no budgetary impact. Indeed, no appropriation for this purpose was forthcoming as Congress again tacked a new duty onto the federal grant system without funding it, even though it was readily foreseeable that Section 504 equality would require costly implementation and would divert grant dollars from their primary purpose.[30]

Depending on how such a program is structured or defined, however, a strategy of full reimbursement for all existing and future mandates could present a series of difficult fiscal and administrative problems for the national government. To begin with, given the lack of discipline in the federal budget process, full reimbursement of federal regulations could place an intolerable strain on an already overloaded federal budget if the number of costly requirements was not sharply reduced.

In addition, simply defining the range of programs and activities subject to reimbursement is a difficult task. Some observers narrowly define the term "mandate" to mean only direct order requirements, while others would deem the full range of newer intergovernmental regulatory mechanisms worthy of reimbursement. Still others, like the public interest groups and the Congressional Budget Office, cast the net even wider, including under mandates ordinary grant conditions—even maintenance of effort and matching requirements.

Establishing the range of federal regulations subject to reimbursement represents only an initial task, however. More complicated still would be the actual process of administering a reimbursement program. Presumably, state and local governments would qualify for reimbursement, not only for the obvious direct costs of federal regulation, but for a variety of indirect costs as well, ranging from administrative overhead to effects on local government productivity. Unfortunately, many of these indirect costs are nearly impossible to measure, much less to reimburse.[31]

Another serious measurement difficulty concerns separating federally mandated activities from those actions that would have been performed in the absence of federal regulation. Under any reimbursement scheme, the federal government should be liable only for *additional* costs, those exceeding what the state or local government expended prior to the mandate's imposition. Initially, such costs can be measured with considerable accuracy. Over time, however, this concept of regulatory costs would tend to grow increasingly speculative because there is often no way of knowing what a state or local government might have done on its own in the absence of a federal mandate.

Finally, determining the costs imposed on *all* state and local governments is an awesome auditing and accounting task. To estimate mandate costs for the recently enacted fiscal notes process, the Congressional Budget Office plans to derive information from a sample of selected jurisdictions.[32] This approach greatly simplifies the estimation process, but a sampling procedure can be adapted to paying reimbursement checks only with difficulty. Because federal regulations affect individual jurisdictions very differently, a sampling procedure could produce substantial overpayments to certain jurisdictions while underpaying others.

Not surprisingly, many of these problems have become evident at the state level, where efforts to establish programs for reimbursing state mandates on local governments have tended to produce mixed results. Twelve states now have Constitutional provisions or statutes requiring reimbursement of state-imposed mandates.[33]

The effects of such provisions have been studied most extensively in California, which established a mandate reimbursement process in 1973. One study of its implementation found the process: (1) was often hampered by long delays in funding local claims for reimbursement; (2) engendered complaints by local governments about detailed requirements governing the payment of claims; and (3) eroded local incentives for adopting cost-effective means of mandate administration.[34] The most severe problem, however, was found to be a "lack of clarity" in the statutory definition of a mandate, producing "inconsistent determinations" of which regulations justified state funding.[35] When various state officials were asked to determine which of eight hypothetical mandates would require reimbursement, unanimous agreement was reached on only one of the eight. Accordingly, the California law was amended in 1980 to help clarify the definition of a reimbursable mandate, but the effects of this amendment are not yet known.

SELECTIVE REIMBURSEMENT

One strategy for avoiding some of the potential problems posed by full mandate reimbursement is to focus federal reimbursement on just a small selection of very costly intergovernmental regulations. This strategy would not resolve all of the problems of cost measurement and funding distribution outlined above, but it would reduce the scope of such tasks—especially for programs that already provide a modicum of grant monies for regulatory purposes. In such cases, outlays for the affected grants could simply be expanded.

Many of the problems traced to inadequately funded federal mandates stem from a relatively limited number of regulations. In the initial passage of most of these programs, Congress gave early recognition to the need for some federal funding to achieve their purposes, but it often underestimated what the actual scope of the costs would be or it failed to deliver adequate appropriations in subsequent years.

For example, total future costs of existing water pollution control requirements are estimated to be $120 billion, yet annual appropriations for federal sewer construction grants fell from $4.5 billion in FY 1978 to $2.5 in FY 1981.[36] The deputy administrator of EPA observed that "unstable and unpredictable" funding had been a major problem in the program.[37] In the *Education for All Handicapped Children Act*, Congress authorized a hike in federal funding for handicapped education from 5% of the program's mandated costs in FY 1978 to 40% of these costs in FY 1982 and beyond. However, federal appropriations for the program peaked at about 12% of the costs in 1979 and have remained at, or below that level in subsequent years.[38]

Similar problems have been identified in other programs. Initial cost estimates for implementing Section 504's requirements of equal access for the handicapped were placed at $6.8 billion in mass transportation alone.[39] Subsequent federal regulations in this area were designed to reduce these costs by allowing recipient jurisdictions more flexibility in providing equal transportation access. However, the costs of the major alternatives studied by the Congressional Budget Office remained in the multibillion dollar range.

Funding shortfalls in the *Safe Drinking Water Act* have not approached this level of magnitude, but the U.S. General Accounting Office did conclude that inadequate funding ranked among the primary obstacles to its effective implementation.[40]

A strategy of selective mandate reimbursement, therefore, would focus on a few costly regulations of this type, where fiscal burdens are particularly large and where funding shortfalls clearly hamper attaining regulatory goals. For state and local governments, this strategy would provide substantial fiscal relief while, at the same time, avoiding some of the administrative problems posed by full reimbursement.

On the other hand, this strategy would also impose substantial burdens on the deficit-ridden federal budget. In addition, it abandns the simplicity and deterrent potential of total reimbursement. Decisions over which regulations would or would not be reimbursed under this strategy would be largely arbitrary. The net could be cast much wider than the four regulations mentioned above. Inadequate funding also has contributed to implementation problems under federal hazardous waste and billboard control programs, to name only two.[41] Ultimately, the number of programs that might be encompassed under this alternative would be determined by a difficult political balancing act with state and local needs on one side and limited federal government resources on the other.

NO MANDATE REIMBURSEMENT

A third strategy continues the status quo in regulatory reimbursement. Although the federal government often helps promote compliance with regulatory goals by providing grants-in-aid, there is no legal or moral obligation to do so for any regulation that is Constitutional and legitimate. The basic issue, under current practice, is whether the goals and procedures of a given regulation are appropriate, not what level of costs it imposes.

This position finds many adherents among defenders of federal regulations. In the case of handicapped education requirements, for example, former Commissioner of Education Ernest Boyer has argued that the federal government is under no obligation to bear the costs of requiring states to provide services they should have offered all along. "We're talking about rectifying an historic oversight," he observed. "Just because the federal government identified the issue it doesn't follow that Washington has to provide the funds."[42] Others have argued much the same position with regard to Section 504. According to one account, some enforcement officials believed that costs were "irrelevant." "Someone's rights do not depend upon someone else's ability to pay," said one former Office of Civil Rights official. "It is a matter of the right to participate in American society."[43]

On the other hand, defenders of existing funding practices need not hold the view that costs are irrelevant in federal programs. Many believe that the federal government should refrain from imposing a requirement on state and local governments until it has considered the least costly means of advancing its regulatory aims. In essence, this is the position of the Reagan Administration, which has sought to ameliorate the costs of intergovernmental regulation by scrutinizing and relaxing regulatory standards rather than by reimbursing costs.[44]

THE COMMISSION'S APPROACH

Having considered all of the arguments put forth on behalf of these alternative strategies, the Commission recommends that all future additional costs imposed on state and local governments by federal mandates by fully reimbursed by the national government. Although the Commission supports the cost-cutting objectives of regulatory analysis, current ad hoc practices of mandate funding have not adequately addressed the problems resulting from excessive mandated costs. Experience has shown that the absence of legal responsibility by the federal government for regulatory costs has contributed to excessive regulatory growth and attendant problems of poor regulatory performance.

The Commission also views selective reimbursement of federal mandates as inadequate. This strategy has the disadvantage of imposing large financial burdens on the federal budget currently, when it can least afford it. Yet it lacks the merits of establishing a clear principle of federal responsibility for regulatory costs for any future costly programs.

Consequently, the Commission strongly affirms the principle of federal responsibility for mandated costs, but it has carefully tailored its recommendation to current budgetary realities and to the administrative difficulties posed by full reimbursement of all existing mandates. This recommendation is limited to costs imposed on state and local governments by future intergovernmental regulations. This restriction avoids excessive immediate demands on the deficit-ridden federal budget while simultaneously establishing an effective fiscal deterrent to future regulatory proliferation. The recommendation is also limited to additional direct costs of regulations, e.g., those expenses that are clearly attributable to implementing the regulation, above and beyond any related activity that would have been carried out in the absence of the federal mandate. Although the Commission recognizes that such additional costs are difficult to measure and define, it expects that appropriate methodologies will be perfected by the Congressional Budget Office in implementing existing "fiscal notes" legislation. The exclusion of ambiguous "indirect" costs, like losses of efficiency and externalities, also simplifies this task. Finally, to strengthen implementation of this recommendation by potentially reluctant federal administrators, it contains an action-forcing provision: holding state and local governments free from regulatory compliance for any future federal mandates that are unreimbursed. This provision provides justiciable grounds for challenging any future unfunded mandates.

Recommendation A.3

Restoring Constitutional Balance in Intergovernmental Regulation

The Commission finds that the newest forms of intergovernmental regulation—the partial preemption, the crosscutting grant requirement, the crossover fiscal sanction and the direct order—have been the source of considerable friction and confusion despite their ostensibly legitimate foundation in such sources of Congressional authority as the interstate commerce clause (partial preemptions and direct orders) and the conditional spending power (crosscutting requirements and crossover sanctions). The Commission believes that this intergovernmental friction and confusion have been exacerbated by static judicial interpretations narrowly defining those functions of state and local governments that are constitutionally protected against federal intrusion, while at the same time vastly expanding the scope of Constitutionally sanctioned federal prerogatives.

The Commission is convinced that the new regulatory techniques represent major departures from past intergovernmental practice—not only in a pragmatic sense but in a legal and Constitutional sense as well. Therefore,

A.3(a) Reassessing Constitutional Boundaries

The Commission recommends a reassessment of the legal doctrines delimiting the boundaries of national Constitutional authority vis-a-vis the reserved powers of the states so that those reserved powers again become meaningful and viable. To help restore a sense of balance between the levels of government, the Commission urges reconsideration by the national legislative, executive and judicial branches of current interpretations of the commerce and spending powers as they apply to the newer and more intrusive forms of federal regulation, such as partial preemptions, crosscutting grant requirements, crossover sanctions applied to federal aid and direct orders.

A.3(b): Judicial Interpretations

The Commission applauds the Supreme Court's recognition in National League of Cities v. Usery, 426 U.S. 833 (1976), that "Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made." At the same time, however, the Commission finds that several recent Supreme Court decisions and many lower court judgments have eroded the basic Tenth Amendment principles expresed in the National League of Cities case. The Commission, therefore, expresses its hope that the federal judiciary will revive and expand upon the principles expressed in NLC v. Usery, particularly those addressing the "basic attributes of state sovereignty" and "integral functions" of state government.

Although the Supreme Court in NLC v. Usery Constitutionally limited Congress' power to regulate the states under the interstate commerce clause, the Commission believes that in certain instances regulations promulgated under the conditional spending power may be equally as injurious to state sovereignty. The Commission notes that despite vast differences between the grant system of six decades ago and that which exists today, the Court has done little to alter its original grant-in-aid doctrines. Thus, given the substantial fiscal reliance of state and local governments upon federal financial aid and the often intrusive nature of regulations attached to modern federal grants, the Commission expresses its further hope that the federal judiciary, when judging grantor-grantee disputes, will recognize that "compulsion" rather than "voluntariness" and "coercion" rather than "inducement" now characterize many federal grants-in-aid and their requirements.

A.3(c): The Solicitor General's Role's*

The Commission recommends that the Administration, through the Office of Solicitor General, show special sensitivity to the claims of state and local government in arguing or otherwise entering into relevant cases before the federal judiciary when such cases pertain to the newer and more intrusive forms of regulation described above.

A.3(d): Supporting the State and Local Legal Center

The Commission recommends that state and local governments and their associations give full institutional and adequate financial support to the State and Local Legal Center in its monitoring, analytic and training efforts and in its efforts to assist in presenting common state and local interests before the federal courts.

The new awe-inspiring growth in the quantity and breadth of federal regulatory policy, like the growth in almost every area of federal endeavor, could hardly be called the product of a grand design—much less a grand Constitutional design. Rather, regulatory expansion has been piecemeal—one requirement building upon another. Yet, grand design or no, each regulation must find justification in some portion of the Constitution. Thus, Congress' Article I, Section 8 charge to "regulate commerce . . . among the several states . . ." has given rise to partial preemptions and—less successfully—to some direct orders.[45] The so-called conditional spending power, contained in the same section, has been deemed an adequate Constitutional warrant for crosscutting grant requirements and for crossover fiscal sanctions.

REASSESSING THE CONSTITUTIONAL BARRIERS

Neither the commerce nor spending powers are Constitutionally omnipotent, for Congress, in exercising those powers, may not run afoul of any other portions of the Constitution— including the Bill of Rights, one of which, the Tenth Amendment, asserts that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Because the federal government is theoretically one of limited powers, the Tenth Amendment would appear, at face value, to invest rather substantial authority in the states. However, that face value reading ignores the Tenth Amendment's rather dubious distinction of having been demoted in stature to the ranks of a mere Constitutional "truism"[46]—more akin to "conventional wisdom" than part of the "supreme law of the land." Not coincidently, that downgrading was accomplished alongside the phenomenal New Deal upgrading of the commerce power. Hence, an amendment "frequently invoked to curtail [Congress'] power to regulate interstate commerce"[47] had become, by mid-century, no more than a legal straw man.

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*Deputy Under Secretary Koch, County Executive Murphy, and County Supervisor Schabarum requested to be recorded as opposing this recommendation. Deputy Under Secretary Koch provided the following statement of her position, with County Executive Murphy concurring:

> It is the responsibility of the Solicitor General to represent his client—the United States Government—in cases in which the U.S. is involved, and to defend the best interests of the U.S. as he sees them. The Solicitor General is not in a position to make policy decisions by modifying his actions to take account of the interests of opposing parties. In fact this could be seen as running directly counter to his duty. Such policy issues are properly directed toward Congress and the President. Therefore, it is inappropriate for ACIR to ask the Solicitor General to alter his manner of meeting his responsibility to the U.S. Government as this resolution suggests.

The Commerce Power and the NLC Case

In 1976, the Supreme Court at least temporarily halted further erosion of the states' reserved powers, ruling that: "Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[48] At issue in *National League of Cities v. Usery* (NLC) were the 1974 amendments to the *Fair Labor Standards Act* that applied federal minimum wage and maximum hour requirements to most state and local employees[49]—clearly, a direct federal order to the states. Conceding the "plenary authority" of the commerce power over "areas of private endeavor," the Court refused to grant the same absolute federal prerogatives to the states' public endeavors. Thus, it interpreted the Tenth Amendment's reserved powers clause as shielding the states from commerce power-related[50] Congressional mandates that:

1) regulate the "states as states";[51]
2) impair certain distinctive "attributes of state sovereignty";[52] and
3) alter or displace the states' ability to "structure integral operations in areas of traditional governmental functions."[53]

Not surprisingly, the *NLC* decision was heralded as a milestone in efforts to "rebalance" intergovernmental relations. It was, after all, the first major Tenth Amendment victory in the federal judicial arena in decades. But the opinion also lacked clarity and has been a source of endless confusion at the district and appellate court levels, as well as a cause of deep consternation among state and local governments. The Court has left uncertain what elements constitute the "attributes of state sovereignty"; has failed to provide guidelines for identifying integral governmental operations; and, to the disappointment of many, has rather narrowly (some would say rigidly) interpreted the areas of traditional governmental activities.[54] Nevertheless, on the positive side, the Court's 1976 decision has been successful in arresting further Congressional direct orders based on the commerce clause.

Congressional mandates in the form of blatantly intrusive direct orders have been few in number. Moreover, many would contend that these most obvious directives have been the least of the state and locl governments' regulatory worries. But the commerce clause has been the Constitutional wellspring of another of the new intergovernmental regulatory techniques—partial preemptions, in which administrative responsibility is delegated to the states or localities, provided they meet certain nationally determined standards.

For all practical purposes, this sort of backdoor commandeering is quite different from full federal preemption. It borders on *mandating* state activity as opposed to *disallowing* state activity. For Constitutional purposes, however, the courts have tended to view these partial Congressional preemptions in a "commerce power-as-usual" light, despite a number of Tenth Amendment, *NLC*-type challenges.

Regulating Through the Conditional Spending Power

In 1923, the Supreme Court heard the case of *Massachusetts v. Mellon*,[55] a challenge to a federal grant-in-aid program. The Court dismissed the dispute by noting that:

> Probably, it would be sufficient to point out that the powers of the states are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. . . . If Congress enacted [the program] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.[56]

Though nearly 60 years old, that logic has become perhaps the most consistent line of defense in cases protecting federal grant conditions—the so-called "inducement versus coercion" equation. Later supplemented by the criterion that conditions of aid need only be "reasonably related to a legitimate national purpose"[37] (or conversely, that "federal funds [may not be used] for purposes contrary to general government policies"[38]), the enhanced "Mellon test" has survived practically unscathed through innumerable court battles.

That a Constitutional test constructed to vindicate the simple and dwarfish grant system of the 1920s retains legal sway over a grant system characterized by complexity and giantism is not necessarily surprising. In fact, it may be justified in very pragmatic terms. As Justice Benjamin Cardoza pointed out:

> . . . To hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of will as a working hypothesis in the solution of its problems.[39]

Not every Constitutional scholar would agree with Cardoza and his judicial successors. For instance, Profesor A.E. Dick Howard has called such reasoning "simplistic":

> It makes Constitutional limitation on Congress' power illusory by permitting Congress to do indirectly what it cannot do directly. The principle is that of unconstitutional conditions. Simply because government need not create a benefit (e.g., a deduction from one's income taxes for charitable deductions), it does not follow that the government may attach such conditions as it pleases to that benefit. Government may not require me, as a condition of taking the deduction, to attach an affidavit swearing that I do not believe in the principles of world communism. It is no answer to say that I have a "choice"—file the affidavit or forego the deduction. Similarly the Constitutionality of conditions attached to federal grants is not assured simply by declaring that a state is "free" to refuse the federal money if it objects to the condition.[40]

Even such strong critics as Howard would probably not object to the bulk of clearly stated, program-specific grant conditions. The federal government, most would contend, has a perfectly legitimate interest in seeing that its funds are effectively, efficiently and Constitutionally spent. In such cases, the "caveat emptor," *Mellon* approach to grants is, arguably, quite proper. It is with regard to the newer forms and effects of conditions that many critics, including this Commission, deem the older legal tests no longer adequate.

Thus, certain conditions may be said to cross the line between inducement and coercion by virtue of impinging on some aspect of state sovereignty. An excellent example is provided by the *National Health Planning and Resources Development Act of 1974* as applied to the State of North Carolina.

At issue was the act's requirement that states, in exchange for receiving funds, regulate the construction of both public and private health facilities as well as the purveyance of public and private health services. North Carolina argued that these aspects of the program

> . . . crossed the line from inducement to coercion and was a violation of the Tenth Amendment and the Supreme Court's decision in the *Steward Machine Company* case. The state argued that the requirements to regulate private institutions violated the state constitution and that by proposing the sanction of withdrawal of Medicaid and other health care funds the state was placed in the untenable position of having to amend its constitution or forego substantial federal funding for health care.[41]

If a state's constitution is not integral to its sovereignty, what is? Yet, the District Court, in a decision affirmed by the Supreme Court, dismissed North Carolina's contentions, noting that:

> Simply because one state, by some oddity of its constitution may be prohibited from compliance is not sufficient ground to invalidate a condition which is legitimately related to a national interest sought to be achieved by a federal appropriation and which does not operate adversely to the rights of the other states to comply.[62]

The Court reasoned that:

> Were [it] not so, any state, dissatisfied by some valid federal condition on a federal grant could thwart the Congressional purpose by the expedient of amending its constitution or by securing a decision of its own supreme court. The validity of the power of the federal government under proper Constitutional power does not exist at the mercy of the state constitution or decision of state courts.[63]

Such reasoning, if at face value Constitutionally logical, shows little sensitivity toward the difficulties of amending state constitutions and reversing state judicial opinions.

Another feature of the *Health Planning Act*, felt by many to be unduly coercive and, by some, unconstitutional, is its crossover fiscal sanction—failure to comply with program requirements may endanger continued funding of other, distinct aid programs.[64] It is just that feature that Lewis Kaden finds not only unique, but assails as being the most objectionable of all conditional techniques in terms of "restricting state choices" and distorting state fiscal decisions.[65] Yet in response to a Montgomery County, MD, challenge, a district court declared that:

> The act imposes no civil or criminal penalties on such states or their officials. While the withholding of federal funds in some instances may resemble the imposition of civil or criminal penalties and while economic pressure may threaten such havoc to a state's well-being as to cause the federal legislation to cross the line which divides inducement from coercion, that line is not crossed in this case. Nor does the act displace local initiative with federal directives. The act mandates essentially a cooperative venture among the federal government and state and local authorities.[66]

Another vexatious issue arising under the conditional spending power is the ability of the federal government to add to, or alter a grant agreement. According to grant law expert Richard B. Cappalli:

> An important grant principle which deviates from traditional contract rules, is that one partner, the United States, can unilaterially modify the terms of the relationship during the term of the grant. By statute or regulation the United States can impose additional obligations under the agreement, although Constitutional restrictions on the impairment of contracts limit that power.[67]

Under certain circumstances, the federal government may thus change the rules of the game after the grantee has already bought into the "contract." Though unemployment insurance coverage is not technically a grant, it provides a leading example of this potentiality.

In 1970, Congress extended unemployment insurance coverage to state employees in hospitals and higher education[68] and in 1976, to all state and local employees.[69] After over 40 years of participation in the program, the effect of the amendments was to offer a Hobson's choice to the states:

> 1) to conform and tax themselves and their political subdivisions the costs of employment benefits, or
> 2) to fail to conform and accept the utter demise of the states' existing unemployment compensation program.[70]

Given such an option, the states were practically forced to comply and at considerable cost.[71]

REASSESSMENT A MUST

The foregoing analysis of the commerce and conditional spending powers provides ample evidence that those twin founts of Congressional authority in the regulatory area have been stretched far beyond the broad boundaries assigned them a generation ago. The newer forms of intergovernmental regulation were developed, largely designed and duly enacted by the national legislative branch. They were implemented and legally defended by the executive branch, and they clearly—with only one exception—have been determined by the courts to be Constitutional.

The time has come for both of the poltiical branches of the national government along with the federal judiciary—each operating in its way and in its proper functional sphere—to begin a thorough reassessment of the current, mainstream interpretations of the commerce and conditional spending powers as they relate to the new regulatory devices. Without such a reappraisal, the Tenth Amendment may well prove to be a permanently impotent protector of state (and local) rights.

JUDICIAL INTERPRETATIONS

Going beyond the needed reappraisal by the three branches of the national government, the Commission urges in the second part of this recommendation that the Supreme Court assume the special responsibility, when relevant cases arise, of reexamining the implications for the entire governmental system of the string of recent decisions eroding *NLC*, and of the other cluster of cases that struggles laboriously to remain true to *Mellon*.

Current Court doctrine holds that to succeed, any Tenth Amendment challenge to federal regulatory legislation based on the commerce power "must satisfy *each* of [the] three [*NLC*] requirements":

> First, there must be a showing that the challenged statute regulates the "states as states." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the states' compliance would directly impair their ability "to structure integral operations in areas of traditional functions."[72]

Because three rather vague and obviously pliable requirements must be met to dispute a federal law, successful challenges have been limited, as noted previously, to direct orders. Though regulatory in nature and based upon the commerce power, partial preemptions are imbued wth certain legal "twists" that distinguish them from direct orders. For instance, with partial preemptions, such as those contained in the *Clean Air* and *Surface Mining Control* acts, it is exceedingly difficult to make the case that regulations affect the "states as states." Rather, they legally affect private parties *through* the states:

> If a state does not wish to submit a proposed permanent program that complies with the act and implementing regulations, the full regulatory burden will be borne by the federal government. Thus, there can be no suggestion that the act commandeers the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program.[73]

In the case of partial preemptions, the courts have relied on Congressional findings that certain problems substantially affect interstate commerce and therefore are legitimate Congressional concerns.[74] Of course, the courts have been acquiescing to Congressional regulation of commerce for nearly half a century. However, the more unique aspect of partial preemption—the involvement of the states—also has been given judicial blessing. Hence, quite apart from negative Tenth Amendment usurpation issues discussed previously, the courts actually have treated partial preemptions positively—even to the point of viewing them as instances of federal deference to state authority:

> In enacting the *Clean Air Act Amendments of 1970*, Congress attempted to foster a symbiosis between two perceived needs. First, Congress wanted to preserve the basic state and local control of the design and enforcement of air pollution regulation. Besides a deference to the states, such a state role permitted more awareness of individual and local problems in formulating pollution abatement plans.[75]

Needless to say, the generally positive judicial view of partial preemptions is not shared universally by legal experts. In fact, Lewis B. Kaden sees the device as an effective limit on the states' basic right to choose among those services they feel best meet the needs of their citizens.

> For all their diversity of method, what these provisions share is the feature of "federalizing" or "commandeering" the basic decisionmaking processes of state government, obliging subnational legislators and executive officials to enact statutes or adopt administrative regulations according to the design and standards set by the federal government. . . . When a part of [the] pool [a state's] resources is commandeered to the service of a federal direction—as when a state is ordered to pass a law, establish a regulatory agency, promulgate a regulation, or expend an allocation of funds according to federal design in ways described above—this fundamental capacity for choice is inevitably reduced.[76]

According to Professor Kaden's logic, then, some (though not all) partial preemptions may be viewed as meeting *each* of the *NLC* tests for a valid Tenth Amendment challenge of the commerce power. First, they affect the states as states, for clearly they influence the instrumentalities of the states—their legislatures and executives. Second, by extension, partial preemptions address matters that are indisputably attributes of state sovereignty. What, after all, could be a more indisputable attribute of sovereignty than the legislative decisionmaking process? Finally, in reducing the states' capacity for choice, partial preemptions impair their ability to structure integral operations in preferred ways.

Turning to the conditional spending power, the federal courts have upheld its extension to highly intrusive program-specific regulations, to crossover fiscal sanctions, to changes in grant conditions after a recipient has joined in an aid program, and to crosscutting conditions—as was noted earlier. These decisions reflect a persistent effort on the part of the judiciary to sustain the *Mellon* dictum that a grant is a quasi-contractual relationship between the donor and donee involving reciprocal obligations for both and allowing the recipient to protect its Tenth Amendment rights by refusing to participate in the aid program.

In effect, the constraints placed on the conditional spending power are fewer than those on the commerce power. Hence, the Court's prediction in *NLC* that Congress might accomplish certain objectives through its spending (and by extension, taxing) prerogatives that it could not accomplish through the commerce clause was borne out when the 1976 amendments to the *Unemployment Insurance Act* were challenged. In 1980 the Supreme Court refused to review a lower court's upholding of the amendments extending the act's coverage to state and local employees on the grounds that the program was technically voluntary and, therefore, not subject to Tenth Amendment restriction.[77] Such decisions have prompted Professor Howard to lament that "*NLC* is an empty vessel waiting to be filled up."[78]

Related to the idea that Congress may be able to change grant conditions in mid-stream is the problem of unclear Congressional intent. In certain instances, a state or locality initially could not possibly have realized the extent of a law's obligations, given the ambiguities of statutory language. Just such a scenario was played out quite recently over the terms of the *Developmentally Disabled Assistance and Bill of Rights Act of 1975*. Significantly, in this case, the Supreme Court did acknowledge certain limitations on the spending power:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the "contract" . . . . Accordingly, if Congress intended to impose a condition on the grant of federal monies, it must do so unambiguously.[79]

At issue in *Pennhurst State School and Hospital v. Halderman* was the "bill of rights" component of the 1975 act. The Court's response to the challenge, capsulized in the quotation above, noted that the "bill of rights"—worded in terms of legislative "findings"—represented, at most, a Congressional preference and, in the absence of language specifically saying so, could not be construed as a condition of aid. Congress was thus admonished for its tendency to favor statutory obscurity. Moreover, the *Pennhurst* decision could potentially set "the stage for attacks on *administrative* implementation of grant strings—through regulations, guidelines, etc.—on the ground that the agency has imposed duties beyond those in the relevant statute itself."[90]

Two additional statements made by the Court in *Pennhurst* could—if developed in subsequent cases—have a profound effect on future judicial rulings relating to grant requirements:

> First, Justice Rehnquist's majority opinion warned that: "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating states with post-acceptance or 'retroactive' conditions."[91]

While it is unclear what would constitute a "retroactive" condition under the first stipulation, it is at least conceivable that:

> [t]aken seriously, this approach would call into question basic features of the grant system such as enactment of new crosscutting conditions which apply to existing programs.[92]

> Second, a footnoted suggestion in *Pennhurst* warned that "[t] here are limits on the power of Congress to impose conditions on the states pursuant to its spending power."[93]

Whether or not the footnoted statement may be taken as an intimation that the Court, in the future, will be disposed to "fill up the empty *NLC* vessel" is impossible to know—a footnote does not a strong precedent make. "Still," according to Professor George Brown, "Supreme Court footnotes are often harbingers of things to come; and this particular statement may force lower courts to take more seriously challenges to grant conditions based on state sovereignty grounds."[94]

It is entirely possible—even quite probable—that *Pennhurst*, like *NLC*, may lie fallow for years to come. The Court's total record on commerce and spending power issues, after all, has been less than amenable to subnational positions and more than deferential, over the long run, to Congressional actions. Moreover, no matter how disposed the Court might be to change long-standing positions, good, tightly woven cases on which it might act are surprisingly few and far between. The Court may be the ultimate arbiter of Constitutional issues, but it must rely on the sound and timely argumentation of others.

In light of the seemingly aberrational status that *NLC* and *Pennhurst* seem to occupy, the Commission believes that the federal judiciary, when judging grantor-grantee disputes, should acknowledge that "compulsion," not "voluntariness," and "coercion," not "inducement," have dominated the relations between disburser and recipient in many grant-in-aid programs. The Commission emphasizes that *National League of Cities v. Usery* should not remain a unique decision. Its precepts regarding "the basic attributes of state sovereignty" and the "integral functions" of state government need revitalization and a real elaboration. Moreover, attempts to establish some parameters for the conditional spending power, such as those made tentatively in *Pennhurst*, should be continued. Without judicial action on both of these fronts, the Tenth Amendment protections afforded to states (and localities) will become not much more than a hollow promise.

A ROLE FOR THE SOLICITOR GENERAL

The executive branch through the Department of Justice is in a position to help the federal judiciary become more sensitive to the systemic effects of their decisions affecting intergovernmental regulation. The Solicitor General's Office not only defends the federal government before the Supreme Court but may also intervene with "friend of the Court" briefs in instances where the national government is not a direct party to a dispute. On occasions, the Solicitor General is requested to present a brief, as was the case in *Thornburgh v. Casey.*[95] In fact, the Supreme Court in that case relied primarily on the Solicitor General's argumentation in reaching and rendering its decision sanctioning the right of state legislatures to reappropriate federal grant funds.

During the past few years, the Department of Justice has entered such diverse cases as those involving mortgage interest rates, the building of nuclear power plants, corporate takeovers,[86] a state's labor-management law, and the applicability of the federal *Age Discrimination in Employment Act* to state and local governments. Each of these cases pitted the scope of the commerce power against a state's police powers. The first three involved a battle between corporate interests and state interests. In all five, the Department of Justice's intervention favored upholding the primacy of the commerce power over state interests. On a controversial social issue, however, the Justice Department recently filed briefs in support of the power of state and local governments to regulate abortions without prohibiting them.[87]

Department of Justice intervention in cases to which it is not a party clearly is commonplace. Against the backdrop of recent decisions as well as several earlier ones in which the Department of Justice joined, the Commission urges that the Administration, through the Solicitor General's Office, show special sensitivity to the claims of state and local governments in arguing or entering relevant cases, especially when such cases involve the newer forms of federal intergovernmental regulation.

STRENGTHENING THE STATE AND LOCAL LEGAL CENTER

Finally, the Commission strongly urges states and local governments and their associations—both national and statewide—provide vigorous institutional and adequate fiscal support for the recently established State and Local Legal Center. This unit, at least in part, grew out of a 1980 Commission recommendation that called on the states and their localities, among other things, to establish "jointly on a permanent basis a state-local legal defense organization, with adequate funding, professional staffing and appropriate assistance from states' attorneys general, to monitor and institute legal action opposing coercive conditions attached to federal grants and intrusive congressional exercise of the commerce power."[88]

This proposal was defended on grounds that states and localities need to maintain "a vigilant posture against coercive federal actions," to assert themselves especially in the federal judicial area "skillfully, repeatedly, forcefully and cooperatively," and to scrap the hit-or-miss, ad hoc approach to mounting a legal appeal against arbitrary federal regulatory actions.[89]

In March 1981, the issue of inadequate legal defense of state-local interests was raised at the mid-winter meeting of the National Association of Counties by spokespersons from the National Institute of Municipal Law Officers. Subsequently, the "Big Seven" took up the matter and through the nonprofit Academy for State and Local Governments a report was drafted for their consideration in the early summer of 1981. The authors consulted with representatives of various state and local associations, states' attorneys general, former Supreme Court clerks, ex-Solicitors General and Justice Department lawyers, among others, and from these meetings emerged the central recommendation of the report: that state and local governments pool their resources to create a small public interest legal center concerned primarily with Supreme Court issues.[90] In the fall, the executive directors of the seven sponsoring public interest groups adopted the report and "began the process of making its recommendations a reality."[91]

The Board of Trustees of the Academy for Contemporary Problems voted to allocate $150,000 over two years to help establish such a center and in September 1982, the Pew Memorial Trust announced a major matching grant to aid in getting the center underway.[92]

Thus, an idea has become an institution—the State and Local Legal Center. Yet, given the array of cases it could well face, its initial early reliance on outside financial help, and the potential for diagreement among the sponsoring organizations as to what should be the foci of the center's attention, the Commission strongly recommends that state and local governments both singly and through their national associations give unstinting policy and financial support to this fledgling unit. The center faces its most crucial period in the years immediately ahead. A safe passage through this perilous period will depend heavily on the extent of moral and monetary support the parent public interest groups provide.

Part B

A REFORM STRATEGY FOR THE NEWER FORMS OF INTERGOVERNMENTAL REGULATION

Over the past 20 years, there has been a substantial expansion of both the ends and means of federal regulation of state and local governments. Prior to the 1960s, federal conditions were commonly attached to individual grants-in-aid to assure fiscal and programmatic accountability in using federal funds. More recently, however, Congress has enacted regulatory statutes greatly extending the federal presence into a variety of new fields. As this report details, many of these programs utilize important new regulatory techniques, including:

- **crossover sanctions**, in which the failure to comply with the requirements of one program may result in the reduction or elimination of aid funds provided under other specified programs, as exemplified by the national 55 mile per hour speed limit and the *National Health Planning Act*;
- **partial preemptions**, which establish a national federal regulatory presence, but authorize states to implement the program if they adopt standards at least as stringent as the federal ones, as provided by the clean air, clean water and OSHA laws;
- **direct orders**, which mandate state or local actions under the threat of criminal or civil penalties, as in the *Equal Employment Opportunity Act*; and
- **crosscutting requirements**, which apply generally to many or all assistance programs, including bans on discrimination on the grounds of race, sex and handicap; environmental impact statement procedures; *Davis-Bacon Act* prevailing wage rules; and many others.

The Commission finds that these newer forms of federal intergovernmental regulation, both singly and in combination, raise serious questions about the Constitutional limits of federal and state authority that have yet to be addressed adequately, ignore the political principles that undergirded the conventional concept of cooperative federalism, and inject an excessive element of federal compulsion into a range of intergovernmental relationships. The Commission further believes that these newer forms raise special problems in their implementation, in part because of their departures from past practice and their more intrusive intervention into the affairs and operations of subnational governments. Because each involves a different approach to achieving national regulatory objectives, the Commission is convinced that each type must be treated separately, establishing a body of principles that applies to pertinent provisions of existing federal grant and regulatory statutes and that serves as a guide to future efforts of national policymakers in drafting and enacting regulatory legislation.

Recommendation B.1

Eliminating Crossover Sanctions in Federal Grant Statutes

The Commission finds that Congress has used the crossover sanction mechanism in several federal programs since 1965. The uses of this device have become a source of much concern among observers at all levels of government, who believe the penalty mechanism is excessively coercive and confrontational in character. Serious objections also have been raised about the practical effects of this device, which may involve penalties so severe that they can scarcely be invoked. Therefore, . . .

The Commission recommends that Congress repeal the provisions of grant statutes that authorize the reduction or termination of funds from other specified grant programs, as well as from the grant program stipulating this requirement, when a recipient government fails to comply with all of the conditions of such a program. The Commission believes that such provisions alter drastically the traditional legal concept under which each grant is viewed as a quasi-contractual relationship, freely entered into but with differing obligations for the grantor and grantee that are clearly established by the statute authorizing such relationships in

the program area covered by the grant. More specifically, the Commission recommends that, among others, the relevant provisions of the Highway Beautification Act of 1965 (23 U.S.C. 131), the National Health Planning and Resource Development Act of 1974 (42 U.S.C. 300m(d)), the Federal Aid Highway Amendments of 1974 (23 U.S.C. 154), the Education for All Handicapped Children Act of 1975 (20 U.S.C.1416), and the Clean Air Act Amendments of 1977 (42 U.S.C. 7505(c) and 7616) be amended to restrict the cut-off of funds in the event of noncompliance to the specific aid program containing the requirement.

In this recommendation, the Commission seeks to halt utilization of the crossover sanction technique for enforcing compliance with certain federal regulations. The crossover sanction device imposes a fiscal penalty such that failure to comply with the requirements of one program results in the reduction or elimination of grant funds in a specified set of other federal aid programs. It is thus distinguishable from penalties attached to ordinary grant requirements, which reduce or terminate only funds associated with the specific program in which a violation occurs, and from crosscutting requirements, such as those which prohibit discrimination in the use of grant funds on the basis of race, color, national origin, sex, age and physical handicap, which apply to federal grants in general. Such requirements are not affected by this recommendaiton.

Significantly, the introduction of crossover sanctions was a relatively recent occurrence in the intergovernmental grant system. The first major program to use the device was the *Highway Beautification Act of 1965*, and it subsequently was adopted in at least four additional programs during the 1970s.

Although all of the programs cited in this recommendation make use of the crossover sanction technique, they differ somewhat in their specific provisions. The *Highway Beautification Act of 1965* provides that states shall lose a portion (10%) of various highway assistance funds if they fail to remove certain roadway signs and advertising, compensate affected sign owners, and otherwise comply with the provisions of the act. Under the *Federal Aid Highway Amendments of 1974* (as further amended by RL 95-599), states can lose 5% to 10% of their funds under three different transportation grant programs if they fail to assure that a growing proportion of drivers obey the national 55 mile per hour speed limit. This provision currently is being phased-in over a five-year period, with the requirement that,in order to avoid the penalty, a greater percentage of a state's drivers obey the speed limit each year. In addition, the law also authorizes federal incentive grants to exemplary states as a further encouragement to enforce the speed limit.

Under the *National Health Planning and Resource Development Act of 1974*, states are subject to having funds from a broad assortment of federal public health programs withheld if they do not establish an acceptable network of health planning and certification agencies. This withholding of funds is to be phased in over a four-year period once a state is found to be in noncompliance, with grants reduced by 25% the first year, 50% the second year, and so on.

Two crossover sanction provisions were added to the *Clean Air Act* in 1977 to supplement other, legally suspect, enforcement provisions. One provision limits federal transportation grants to noncomplying state or local governments, except for certain projects related to air quality improvement. The second provision provides for withholding federal sewage treatment grants from nonattainment areas under some circumstances.

The penalty provision in the *Education for All Handicapped Children Act* is somewhat different from the above provisions because it affects only states choosing to enter the handicapped aid program. Once they have done so, however, failure to comply with the elaborate requirements of the act can result in withholding funds for various other elementary and secondary education programs providing assistance to handicapped children.

Existing statutes, then, vary somewhat in their application of specific penalty provisions. The common use of the crossover sanction principle in all of these programs, however, represents a striking departure from traditional grant-in-aid practice, which confines penalties for noncomplinace to the specific program in which a violation occurs. Yet, in spite of this leap to a new level of federal financial coercion, legislative adoption of the crossover sanction device often was not considered carefully by Congress. As *Chapter 3* of this report demonstrated, such inattention was especially true for the penalty provision included in the highly intrusive *National Health Planning and Resource Development Act of 1974*. Research on the passage of the *Education for All Handicapped Children Act* also indicates the crossover sanction in that law was not a major topic of deliberation.[93]

While often overlooked at the time of passage, the crossover sanction device has since become the focus of considerable concern among specialists in grant law and by state and local government officials. Professor Lewis Kaden writes that "Congress has recently attached a much more elaborate range of conditions and penalties for noncompliance" to federal grant programs, of which crossover sanctions play a prominent role. "Taken together," he concludes, "these measures ... have altered the shape of the federal system."[94] Partly because of its crossover provision, Thomas Madden writes that "The *Health Planning Act* intrudes upon state and local operations to a greater degree than almost any other grant program." He notes that actual implementation of the program's penalty "would cripple a state's efforts to maintain health care assistance for citizens of that state."[95]

Intrusiveness is not the only complaint lodged against the crossover sanction device. The Commission firmly believes that the technique exceeds the proper limits of the Congressional spending power. In particular, it represents a marked departure from the traditional legal theory of the grant. Scholars agree that the Constitutional limits of the spending power remain somewhat vaguely defined by the courts, but according to one analysis:

> If the limits within which Congress has traditionally exercised the conditional spending power are not to be breached, the condition imposed ... must fall within one of two general categories. The condition must be either reasonably related to the goals of the spending program or designed to prevent use of federal funds for purposes contrary to specified policies of the national government.[96]

That is, the courts have held grant-in-aid requirements to be Constitutional if they are reasonably related to assuring that federal funds are spent by the states according to the purposes defined by Congress in the act or to assuring that funds are not used to contravene overarching Constitutional or federal objectives such as nondiscrimination. Under ordinary grant requirements, the courts have held that such conditions do not violate the Constitutional separation of state and federal governments because the states are not legally compelled to obey such a regulation if they choose not to accept the individual grant to which it is affixed.[97] In the case of crossover sanctions, however, a state may be in full compliance with the regulations governing one federal grant-in-aid program but still be subject to a reduction or withholding of funds in that program due to a failure to comply with all provisions of another wholly separate program.

This situation might be compared to that of an individual who holds a credit card account, auto loan, and home mortgage from a single bank. If a crossover penalty applied to the credit card account, the customer would be subject to foreclosure on his home and automobile for noncompliance with a credit card requirement, even if the terms of those agreements were never violated. As Lewis Kaden observed:

> Subjecting the state to a loss of various forms of ... aid if it fails to meet ... elaborate standards [in a separate program] certainly resembles a "civil penalty" imposed on the "state or its officials."[98]

The Commission finds that crossover sanctions are objectionable for another related reason. As *Chapter 2* demonstrated, the legal theory of traditional grants-in-aid postulates a quasi-contractual relationship. That is to say, the law of grants has varied in certain important respects from the pure theory of a contract as it has evolved through common law practice. But elements of a contractual relationship do appear to be present in a grant-in-aid agreement. To the extent that this is true, both parties to the transaction should be aware of their legal obligations at the outset. As the Supreme Court observed recently in the *Pennhurst* decision: "Though Congress' power to legislate under the Spending Power is broad, it does not include surprising participating states with post-acceptance or 'retroactive' conditions."[99] Because federal programs containing crossover provisions frequently have been established subsequent to state acceptance of the separate programs subject to the crossover penalty, the technique appears to constitute such a "retroactive" condition.[100]

Finally, the Commission believes that the practical objections to the crossover sanction device are just as significant as objections based on legal principles. The device is often ineffective because the federal government has a powerful pragmatic interest in not employing the sanction. Invoking the penalty places the federal government in the awkward position of undermining one set of federal interests—which are served by the programs subject to withholding—in pursuit of goals served by a separate program which contains a crossover sanction provision.[101] Accordingly, as Richard Stewart observes, "there are serious political and buraucratic obstacles to actually terminating federal grants or making the threat of termination credible."[102] He notes that such provisions rarely are invoked. Similarly, a GAO analysis of the crossover penalty attached to the 55 mile per hour speed limit concluded: "State officials doubt this sanction will ever be used .... To use the sanction could be counterproductive to the basic intent of the law."[103] In short, the Commission finds that the mechanism is suspect on Constitutional grounds and counterproductive to national goals. Maintenance of a sanction so severe that it is difficult to invoke when needed is at best impractical and at worst serves to undermine respect for law.

The Commission recognizes that the courts thus far have upheld use of the crossover sanction strategy when it has been legally challenged. It is also aware that defenders of the device maintain it is necessary to establish an effective penalty for noncompliance in many of the cases where it is employed. Many of these programs provide only small amounts of grant funds themselves, they argue, so withholding those would exert relatively little pressure on noncomplying state and local governments. In addition, most of the programs affected by crossover sanctions are related to the mandate. Defenders question, for example, whether the federal government should continue financing highway construction in areas which fail to meet air pollution standards.

These arguments were highlighted in Congressional debate on the *Highway Beautification Act of 1965*, which was the first program to utilize the crossover sanction device. Although adoption of a crossover penalty was subject to little Congressional deliberation in several later programs, this was not the case with highway beautification. As *Chapter 3* demonstrated, Congress—responding to Presidential pressure—utilized the penalty because earlier incentive grants to states to encourage the reduction of highway signs had proven ineffective. Similarly, a crossover penalty was added to the *Clean Air Act* in 1977 to bolster its enforcement mechanisms and to reduce reliance on Constitutionally suspect direct order provisions.

The courts, in turn, have upheld these provisions when grant recipients have challenged their legality, although the Supreme Court has not ruled decisively on the subject. For example, the Constitutionality of the *Highway Beautification Act* was upheld in federal district court in 1974. Returning to legal doctrines outlined in the 1920s and 1930s, the Court ruled that the penalty did not "irresistibly compel" the state to participate in the program and that state prerogatives reserved under the Tenth Amendment were not "impermissibly invaded."[104] Likewise, the Constitutionality of the *National Health Planning Act* was upheld in *North Carolina v. Califano*[105] and *Montgomery County, MD, v. Califano.*[106]

Notwithstanding these arguments and legal decisions, the Commission strongly supports elimination of crossover sanctions in grant legislation. In its view, legal doctrines on the federal spending power developed several decades ago are no longer adequate to deal with today's complex web of intergovernmental fiscal transfers and with the profliferating array of intrusive conditions that accompany them. Realization of this situation is beginning to appear in certain court decisions, notably *Montgomery Co., MD, v. Califano.*[107] These doubts, the Commission believes, form the basis for a legal curtailment of the crossover sanction mechanism.

Quite apart from ultimate judicial interpretations of the crossover penalty, Congress, in the opinion of this Commission, should refrain from using such a questionable technique. Although worthy goals may be served by this device, the basic principle of Constitutional government requires that the means of governmental action be as appropriate as the aims of such action. Moreover, Congress should be aware of the practical limitations on using this penalty and recognize its tendency to undermine other Congressional objectives. Crossover sanctions, this Commission emphasizes, violate the letter and the spirit of the Constitutional protection of state autonomy and undermine the goal of cooperative federalism.

Recommendation B.2

Improving the Effectiveness of Partial Preemption Programs

The Commission finds that the principle of federal partnership has not been effectively realized in many of the recent intergovernmental regulatory programs that make use of the statutory device known as "partial preemption." In such programs—major examples of which include the *Clean Water Act*, the *Clean Air Act*, the *Surface Mining Control and Reclamation Act*, the *Resource Conservation and Recovery Act*, the *Safe Drinking Water Act*, and the *Occupational Safety and Health Act*—state governments are authorized by federal law to develop and implement plans for the achievement of national environmental, health and safety standards.

In theory, this approach provides a useful tool for reconciling the independent status and varied circumstances of the 50 states within the federal system with the need to advance important national goals. It is on the basis of this theory of "cooperative federalism" that such programs have been accepted by the Supreme Court as proper exercises of the national power to regulate interstate commerce without abridging the 10th Amendment.

Rather than being administered on a cooperative basis, however, the Commission finds that such programs often have resulted in intergovernmental conflict, confusion and excessive intrusion by the federal government into state legislative, administrative and political processes. On the basis of this assessment,

The Commission recommends that the Congress and the President recognize that the device of partial preemption can be properly and successfully employed only in areas where Congress identifies broad national regulatory goals, while leaving primary responsibility for devising appropriate systems of implementation in the hands of the states. To this end, such programs must utilize regulations allowing states considerable flexibility in selecting among alternative effective and appropriate means for achieving national goals, in light of regional differences among the states and particular conditions unique to each state.

To be administered effectively, such partial preemption programs require the full cooperation and joint effort of the federal and state governments in both planning and implementation. Therefore, in instances in which states are expected to assume a co-regulatory role, the Commission recommends that the Congress and the President provide for a system of improved consultation and coordination between the states and the federal government by:

- **authorizing participation by states at an early stage in developing federal intergovernmental regulations and program standards;**
- **providing for a system of joint standard setting or of state concurrence in developing national program standards, while recognizing the ultimate authority of the federal government to issue such standards in the event of irreconcilable conflicts;**
- **establishing joint committees of federal and state officials to review each program, identify implementation problems, and advise the cognizant department or agency head on appropriate remedies;**
- **incorporating realistic statutory timetables for issuing federal regulations and for state compliance with federal standards; and**
- **providing states with adequate advance notification of available federal funding to assist in meeting state program costs.**

To assure that opportunities for state participation are extended on a truly voluntary and

cooperative basis, the Commission further recommends that states be authorized to elect the option of direct federal administration without incurring any other legal or financial penalty. More specifically, the Commission recommends that Sections 107, 110, 113, 176, and 316 of the Clean Air Act of 1970 and Section 303 of the Federal Water Pollution Control Act Amendments be amended to conform with this cooperative principle.

Finally, the Commission further recommends, that, in those few program areas in which rigid, uniform national standards and implementation systems are clearly necessitated, the Congress consider full federal preemption, standard setting and administration, while allowing for state administration by contract.

In recent years, the federal government has turned frequently to a new approach for administering its regulatory standards: the partial preemption. Simply defined, federal partial preemption statutes establish minimum national regulatory standards, but authorize the states to continue to be responsible for regulatory activities if they adopt standards of their own which are at least as high as the national ones. Should a state fail to adopt or enforce such standards, a federal agency would apply national standards within the state.[108] Although the exact procedures vary from program to program, all contain this common element: if a state doesn't do it, then Washington will.

As indicated in the introductory chapter of this report, the Commission has identified some 13 major partial preemption programs enacted since 1965—the great majority of them since 1970. (These are listed in *Figure 7-1*). The greater number of these programs deal with some aspect of environmental protection. Their enactment reflected a belief that many states were making inadequate progress in the environmental field under preexisting, and generally less stringent, federal and state laws. For similar reasons, the partial preemption device also has been applied to such varied fields as the protection of worker health and safety and the inspection of meat and poultry.

Figure 7-1
Major Statutes of Intergovernmental Regulation Utilizing the Partial Preemption Strategy

Water Quality Act	**1965**
Wholesome Meat Act	**1967**
Wholesome Poultry Products Act	**1968**
Clean Air Act Amendments	**1970**
Occupational Safety and Health Act	**1970**
Federal Insecticide, Fungicide, and Rodenticide Act	**1972**
Federal Water Pollution Control Act Amendments	**1972**
Endangered Species Act	**1973**
Safe Drinking Water Act	**1974**
Resource Conservation and Recovery Act	**1976**
Surface Mining Control and Reclamation Act	**1977**
National Energy Conservation Policy Act	**1978**
Natural Gas Policy Act	**1978**

In principle, partial preemption programs advance goals of general national concern, but allow states some degree of latitude in tailoring the specifics of regulatory policy to fit their particular situations. Moreover, they also allow national policies to be administered by state and local personnel. Thus, they—like the grant-in-aid programs which preceded them historically—were regarded initially as useful tools of "cooperative federalism." This view was apparent in the judgement rendered by Arthur W. Macmahon, a distinguished professor of public administration, in a book published in 1972:

> An arrangement that has begun and should spread allows for state control which goes further than the countrywide national rule. The latter continues to apply unless the state law and its administration are comprehensive and acceptable. This represents an important advance in federalism. It recognizes the need for national standards in many fields; at the same time it is an invitation for the states to act.[109]

This same philosophy is apparent in the formal statement of purpose of many of these statutes. For example, the *Clean Air Act* begins by noting that "the prevention and control of air pollution at its source is the primary responsibility of state and local governments." It continues, however, that "federal financial assistance and leadership is essential for the development of cooperative federal, state, regional and local programs. . . ."[110]

It is on the basis of just this view that such statutes have won the approval of the Supreme Court as an appropriate exercise of the commerce power. For example, the Court has denied that the *Surface Mining Control and Reclamation Act* coerces states into accepting federal regulation in abrogation of Tenth Amendment protections. In *Hodel v. Virginia Surface Mining and Reclamation Association (1981)*, the Court reversed a finding at the district level, noting:

> If a state does not wish to submit a proposed permanent program that complies with the act and implementing regulations, the full regulatory burden will be borne by the federal government. Thus, there can be no suggestion that the act commandeers the legislative processes of the states by directly compelling them to enact and enforce a regulatory program. . . . The most that can be said is that the *Surface Mining Act* establishes a program of cooperative federalism that allows the states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.
>
> . . . Congress could Constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the *Surface Mining Act* should become Constitutionally suspect simply because Congress chose to allow the states a regulatory role.[111]

Actual experience under many of these programs, however, belies the theory of cooperative action. Rather than fostering partnership, partial preemption programs have frequently created intergovernmental confusion and antagonism, and produced slow progress toward the achievement of national goals. One study of air pollution policy concluded that:

> The *Clean Air Amendments of 1970* took far too rigid and polar an approach to "cooperative" federalism, with the result that there has been very little cooperation. Under the legislation, the federal government has dictated standards and left implemention in the first instance to the states and in the last to the federal government, with too little room for interaction in between.[112]

This same view was echoed in a General Accounting Office study, based upon a survey of state administrators of five environmental programs: the *Clean Water Act*, the *Clean Air Act*, the *Resource Conservation and Recovery Act*, the *Safe Drinking Water Act*, and the *Federal Insecticide, Fungicide, and Rodenticide Act*. The GAO concluded:

> Overall, the EPA-state partnership envisioned by the Congress has not materialized. The causes of the poor relationship between the states and EPA are many and varied, but the message from state environmental officials is loud and clear—the EPA-state partnership needs help.[113]

Thus, a variety of sources suggest that partial preemption programs require modification if unnecessary regulatory burdens are to be reduced and national policy objectives are to be realized. Three—the *Clean Water Act*, the *Clean Air Act* and the *Safe Drinking Water Act*—were included in the listing of the ten most burdensome regulatory programs identified by the impact studies summarized in *Chapter 5* of this report. The "green book" prepared by the National Governors' Association, which made recommendations to the President's Task Force on Regulatory Relief, offered specific proposals for reforms affecting the *Clean Air Act*, the *Clean Water Act*, the *Resource Conservation and Recovery Act*, the *Wholesome Meat Act* and the *Wholesome Poultry Products Act*.[114]

A number of proposals have been advanced which, this Commission believes, could reduce many of the intergovernmental tensions that have arisen in connection with partial preemption programs. If faithfully implemented, these recommendations could increase the effectiveness of policy implementation and, at the same time, eliminate unnecessary regulatory burdens on the states and localities.

INCREASED FLEXIBILITY

The foremost justification for bringing the operation of partial preemption programs closer to the theoretical ideal of cooperation, in the view of many critics, lies in assuring states greater flexibility in selecting among alternative effective and appropriate means for achieving national goals. Conversely, the lack of such flexibility under existing rules has been a frequently noted problem. The General Accounting Office survey, mentioned previously, found that:

> The states believe that EPA has not given them the flexibility to adapt their programs or unique characteristics to the national regulations. Nearly two-thirds of state environmental officials identified the inflexibility of regulations and guidelines as significantly impeding their programs.[115]

Furthermore, the GAO noted that:

> The consequence of writing regulations for a national audience with markedly different characteristics is that those regulations do not fit any state well. The more specific the regulations, the more troublesome the fit.... While the task of writing national regulations is admittedly not an easy one, they can be made more flexible.[116]

A variety of examples might be offered to illustrate the charge of federal inflexibility in applying statutory standards. During the late 1970s, the Office of Surface Mining interpreted so narrowly the "state window" under which state plans could gain acceptance that only three such programs—those of Louisiana, Mississippi and Texas—won full approval. These states had "cloned the act," one agency official explained.[117] The same problem appeared in the Environmental Protection Agency's interpretation of requirements for the approval of state hazardous waste management programs under the *Resource Conservation and Recovery Act*. According to the National Governors' Association:

> Although RCRA requires the states to adopt standards "that provide substantially the same degree of human health and environmental protection" as the federal standards, EPA is demanding that the states replicate the federal rules.... Congress intended that the states have the responsibility for carrying out permit and enforcement functions under RCRA. EPA is forcing states to discard their rules, developed over years of experience. State programs should be required only to demonstrate acceptable levels of health and environmental protection. States should not be forced to adopt rules identical with federal standards.[118]

Some of the most serious difficulties have arisen in connection with state implementation of the *Clean Air Act*. As the National League of Cities noted in its submission to the President's Task Force on Regulatory Relief:

> State Implementation Plans (SIPs) must contain all programs, rules and regulations to be issued by state and local government that will lead to attainment of national air quality standards by specific deadlines. Virtually every element in the SIP, including each individual operating permit, requires a complete SIP revision. This entails lengthy public hearings and other federal administrative procedures which are extremely time consuming and duplicative of state and local efforts.
>
> The requirements leave virtually every state and local regulation and permit in a state of legal uncertainty for months or years, and have had a chilling effect on industrial expansion and on innovative pollution control efforts. Furthermore, in order to be "federally enforceable", state and local regulations and permits must be exceedingly specific, which leads to unnecessary rigidity in pollution control requirements.[119]

A variety of proposals already have been advanced with the aim of increasing state flexibility in particular partial preemption programs. The National Association of Counties, for example, has indicated strong support for the *Safe Drinking Water Act*, and recognizes that the EPA may specify an appropriate treatment technique. At the same time, it contends that the EPA should allow the use of a comparable alternative treatment technique which can achieve national performance goals.[120] In the case of the *Clean Air Act*, the National League of Cities and many other state and local groups urge that EPA recognize state or local operating permits made pursuant to generic rules contained in a State Implementation Plan, thereby eliminating the need for individual site-specific SIP revisions.[121]

As noted in *Chapter 4* of this report, a variety of legislative, administrative and judicial forces have been involved in pushing toward excessive specificity and rigidity. In certain instances, broad legislative mandates have been interpreted narrowly by executive agencies. Hence, there are cases in which considerable progress might be made through executive branch action.

To cite one recent reform, proposed rules published by the Office of Surface Mining would eliminate the so-called "state window" and replace it with a system that would allow states to adopt any provisions that are as effective as the federal regulations. States would no longer be required to duplicate the specific approach taken in the federal regulations.[122]

Yet in many cases, as *Chapter 4* also indicates, the inflexibility of environmental regulations may have resulted from Congressional direction. As an example, GAO cites the testimony of the Conference of State Sanitary Engineers:

> The *Safe Drinking Water Act* does not permit the necessary flexibility to the Administrator or to the state to address the problems of small systems in a technical or professional manner and to use reasonableness.[123]

In such instances, statutory revision will be required. A general stance for appropriate policy development has been suggested by the National Governors' Association. NGA has cautioned that there should be highly compelling reasons to justify federal regulations that preempt the policies adopted by state and local officials and voters. At the same time, it noted:

> In cases where Congress determines that federal preemption of state laws is in the national interest, the federal statute should accommodate state actions taken before its enactment. Provision should be made to permit states that have developed stricter standards to continue to enforce them and to permit states that have developed substantially similar standards to continue to adhere to them without change.[124]

CONSULTATION AND COORDINATION

Providing some additional flexibility in program implementation is an essential first step to improving the operation of partial preemption programs. A number of additional measures, however, also are needed, especially ones that open up better channels of communication between Washington and the states.

Although partial preemption programs require close cooperation between state and national authorities if they are to be implemented successfully, many state officials feel that their views have been ignored. According to the GAO's analysis:

> The common thread interwoven throughout these various managerial obstacles is the strongly held conviction of state environmental officials that EPA does not involve them directly in the decisionmaking processes which govern their programs. As justification for greater state input into these processes, state officials point to EPA regulations and guidelines that negatively affect state programs by making unreasonable demands on state resources. As a result of not having their input, state environmental officials believe they are the forgotten partners and are skeptical of new EPA initiatives. That attitude, left unchecked, could have significant ramifications for the

> EPA-state partnership. It is those same officials who must defend the programs and justify the resources and enabling legislation to carry them out at the state level.[125]

In light of these findings, GAO has recommended that

> ... the Administrator, EPA, establish as a high priority in the agency, in conjunction with state representatives, a formal program to improve the EPA-state partnership, including ... establishing procedures to ensure that early state agency input is solicited and considered before any action is taken having a direct bearing on state program implementation.[126]

State and local government officials, too, have indicated a strong desire for full and early involvement in developing federal policies and rules. In the view of the National Governors' Association, successful development of national energy and environmental policies

> ...requires the early, effective and sustained participation of state and local governments. Essential to this participation and federal-state partnership is a system of "consultation and concurrence" between the states and the federal government in all areas of national energy and environmental policy.[127]

Essential elements of such a system, in the governors' view, include procedures for the preissuance review by states of federal energy and environmental regulations and programs standards as well as an adequate opportunity for state review and comment on federal regulations and program criteria.[128]

In recognition of the existing problems that might be fruitfully attacked by joint effort, the GAO has also recommended creating joint EPA-state committees for each program, to perform general reviews, identify implementation problems, and advise the EPA Adminsitrator.[129] In the same spirit, the NGA has proposed creating joint federal-state task forces to insure effective communication on matters of energy and environmental policy.[130]

Another source of friction and poor performance could be removed if Congress took special care in establishing statutory timetables for issuing regulations and program standards by federal agencies and in fixing deadlines for state compliance. As Noted in *Chapter 4* of this study, the process of rulemaking is extremely complex, with the time necessary to bring a new regulatory program into operation measured in years, rather than months. Not infrequently, executive branch agencies have overrun the time limits set for them by Congress—sometimes, though not always, because the deadlines were unrealistic.

Missed deadlines hurt effective program implementation and can expose states and localities to financial or legal penalties. The General Accounting Office survey of state environmental officials noted:

> Nearly all environmental programs have been affected to some extent by EPA's late issuance of regulations. State officials identified this as the greatest single obstacle to the management of their programs.[131]

Although this problem is widespread, it has been particularly troublesome in connection with the *Clean Air Act*, because Washington must examine every change in state implementation plans. In a 1981 memorandum to the Task Force on Regulatory Relief, the President of the National Conference of State Legislators observed:

> Under the current regulations, states are required to submit each and every revision of their State Implementation Plans to EPA for review and approval. This requirement is burdensome and has resulted in undue delays with EPA processing running nine to 12 months with some revisions pending two years or more. These delays result in states losing the ability to deal effectively with state air pollution problems.[132]

EPA's traditional backlog of hundreds of state plan revisions constitutes one of the major sore points between the states and Washington. As a solution, the Western Governors' Policy Office has urged that federal approval of state plans be automatic after 90 days, unless EPA specifically objects. A number of state groups have backed a similar change incorporated in a draft bill (HR 5252) introduced by Rep. Thomas A. Luken into the 97th Congress and supported by the Administration.[133]

A similar problem has emerged in the programs of other agencies. For example, another GAO report noted that states were having trouble meeting the timetable established under the *Surface Mining Control and Reclamation Act* because the Department of Interior had missed its own statutory deadlines for issuing program regulations. On this basis, GAO recommended that the Congress amend the law to grant states additional time to develop their programs and Interior time to review them.[134]

In a general comment on regulatory issuance schedules, the National Governors' Association has noted:

> Implementation of federal regulations at the state level often requires significant program or administrative changes. State laws or regulations may need to be revised. Additional funds or staffing measures may be required. Forms and procedures must be developed and implemented. Computer systems may need to be modified and staff must be trained or retrained. Often complex plans or applications must be developed and reviewed. All of these steps take time and many cannot begin until the federal regulations become final. Without adequate lead time, program implementation may be inefficient and inaccurate. Unrealistic schedules increase public dissatisfaction and complicate the development of accessible and accountable programs.[135]

Frequent regulatory changes, the NGA noted, make matters even worse. Its report on regulatory problems noted that, between November 20, 1975, and January 7, 1976, the *Federal Register* contained 31 EPA air pollution items—more than one for every working day.[136]

As a general rule, the NGA has proposed that states and localities should be given at least six months for the implementation of new procedures involving no further federal action, and at least 12 months where there is a requirement for federal review of state proposals and plans, as there is in most partial preemption programs.[137]

Past experience also suggests that statutory deadlines for attaining some federal environmental policy goals were unrealistically short. The NGA has made specific recommendations regarding the extension of deadlines established under the *Clean Water Act*, the *Clean Air Act*, and the *Safe Drinking Water Act*.[138]

A third source of state and local dissatisfaction involves the availability of grant-in-aid funds. Many partial preemption programs impose substantial costs which can be defrayed, in part, through federal assistance. In many instances, however, progress toward national goals has been hampered because federal funds wree not made available in a timely manner.

A lack of resources at an early stage of implementation can seriously impede achieving federal goals. For example, the Environmental Protection Agency was unable to obtain the authorized funding for carrying out hazardous waste management programs under the *Resource Conservation and Recovery Act of 1976*. Because of inadequate funds and staff resources, many states were very slow to develop waste management programs. Unless adequate assistance is provided, many states have indicated that they may not be able to accept responsibility for executing the act.[139] Given the special character of partial preemption programs the Commission finds this response an understandable one.

According to the GAO survey of state environmental officials, uncertainty about future federal funding is an even greater obstacle to program management than the lack of adequate funding. Doubts about the continuation of sufficient federal support for environmental programs have been an obstacle to winning state passage of necessary enabling legislation.[140] Six states and the District of Columbia thus far have refused to take responsibility for administering the *Safe Drinking Water Act*. Fear of a future cutoff in federal funds is one of the chief reasons, according to the deputy director of EPA's drinking water program.[141]

Budget cycles, personnel procedures, and the necessity for long-range planning make effective program management difficult unless the availability of resources is known well in advance.[142] In this regard, some of the most serious difficulties have occurred in connection with the construction grants authorized under the 1972 *Clean Water Act*, which is also by far the most costly federal environmental mandate. Historically, construction grant funding has fluctuated widely from year to year, causing much disruption in state programs.[143]

A further aggravating factor, according to GAO, has been a pattern of late awarding of EPA's annual environmental grants. Some states have contemplated or actually terminated employees carrying out federal regulations because of delays in receiving grant funds.[144]

To alleviate these difficulties, this Commission has previously recommended that Congress take steps to reduce funding uncertainties, including establishing a two-year appropriation cycle for grant programs that are amenable to such a cycle, and setting budget targets for programs two years beyond the current budget year.[145]

ASSURING VOLUNTARY PARTICIPATION

Although the foregoing recommendations, if faithfully implemented, would go far toward restoring a spirit of partnership to the operation of partial preemption programs, this Commission and others believe that more fundamental reforms are in order in certain cases. The legal arrangements established under some of the most far-reaching partial preemption programs pose serious threats to the autonomous legal status of the states within the American federal system. Hence, as a matter of Constitutional or philosophical principle, the provisions of certain key environmental statutes merit scrutiny and revision.

This contention requires that a sharp differentiation be made between the normal partial preemption program and those few which utilize the more coercive variant that some have termed "legal conscription."[146] The *Occupational Safety and Health Act* is a typical instance of the former; the *Clean Air Act* stands out as the preeminent example of the latter.

The OSHA law, like all partial preemption statutes, begins with an asserting of federal authority over the workplace environment. State jurisdiction is preempted, and the Secretary of Labor is given responsibility for developing and enforcing national standards related to occupational health and safety.

Once involvement by the states has been legally foreclosed, however, they are allowed back in—on terms specified by the federal government. That is, states are authorized to develop and enforce their own workplace health and safety plans *if* they are at least as effective as the national standards. Financial assistance is provided to make this option more enticing.

Similar arrangements are followed in the great majority of programs using the partial preemption format. For example, the *Resource Conservation and Recovery Act of 1976* permits a state to regulate hazardous wastes if its existing or proposed program meets federal standards. Financial assistance is available to states choosing to develop and implement state plans. Otherwise, federal regulation of hazardous wastes is instituted.

As Dubrick and Gitelson point out, state participation under such arrangements is voluntary, although state discretion—once involved in a program—is often quite low.[147] To a considerable degree, then, program decisionmaking under this variety of partial preemption parallels the traditional, contractual theory of a categorical grant-in-aid. Participation on the part of a state is not forced, even though there are strong incentives. Approval on the part of the national government is conditional but, if funds are provided, certain programmatic requirements must be followed.

Experience shows, moreover, that where states are free to choose to develop their own plans or leave the matter in federal hands, many will opt for the latter course. Less than half of the states operate federally approved and support OSHA programs. Apparently, some regard the federal offer to pay half the costs of a state program as insufficient to bring them into this complex and troublesome policy field.[148] Similarly, according to a recent count, the federal government inspects meat in 24 states and poultry in 28 states under the partial preemption provisions of the *Wholesame Meat Act* and the *Wholesome Poultry Act* respectively.[149]

In sharp contrast, the *Clean Air Act* makes no pretense that state participation is voluntary. Rather, the full legal authority of the federal government is employed to coerce state involvement and compliance. Under Section 107(a) of the CAA, each state *must* submit an implementation plan which specifies "the manner in which national primary and secondary air quality standards will be achieved and maintained within each air quality control region in the state." This charge is repeated in Section 110, which further specifies the grounds under which the Administrator shall approve or disapprove a state plan, and also provides that he shall "promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a state" which has failed to meet the statutory requirements.

Enforcing industry compliance with plan provisions is basically entrusted to the states. However, Section 113 provides for federal enforcement where widespread violations indicate that a state has failed to enforce its plan effectively. Some administrators and judges also have construed this section as granting EPA the authority to compel states to enforce federally drafted SIP revisions. Sections 176 and 316, added by the 1977 CAA amendments, bring financial pressure to bear by barring certain transportation, air pollution and wastewater treatment grants to states which have not submitted and implemented a fully adequate SIP.

Although the *Clean Air Act* remains unique in its scope and power, similar provisions are found in a portion of the *Federal Water Pollution Control Act* (or *Clean Water Act*). The FWPCA, which was in many respects modeled upon the *Clean Air Act*, mandates in Section 303 the development by states of water quality standards for instrastate waters, subject to review, approval and revision by the federal EPA. However, states are authorized—but not required—by Section 402 to administer their own permit programs to control the discharge of pollutants into navigable waters. As of early 1982, 23 states and territories still had declined to take over the management of the permit program.[150]

From the standpoint of history and federalist philosophy, statutes of this character are a striking departure from American traditions. Indeed, to some, they signal a movement toward a wholly national or unitary state. Dubnick and Gitelson charge that

> ... it is in the legal-conscription mechanisms that the movement away from traditional federalism is both most blatant and extreme. By being able to use its legal capacities to literally force subnational units to act on behalf of national policies, Washington takes on the role of a hierarchical superordinate that can use coercive sanctions to compel cooperation from state and local units.
>
> Legally and Constitutionally this can only be described as a revolutionary change in formal American government institutions.... As we witness a movement toward it and the assertion of preemptive capabilities (as well as a simultaneous movement away from financial and technical assistance), we are witnessing one more step in the ongoing demise of traditional federal relationships.[151]

This Commission condemns this trend. There is more at stake here than a mere choice among alternative intergovernmental program strategies. If this conscriptive pattern of partial preemptions goes unchallenged or unchecked, the legal, fiscal and political consequences for our federal system would be profoundly negative.

In purely legal terms, it is uncertain that such provisions could withstand Constitutional scrutiny. Although the commerce power gives Congress ample authority to regulate pollution from private sources, it is by no means clear that it justifies compelling state and local governments to implement federal environmental policies.[152] As Richard B. Stewart notes,

> Interference with the states' political autonomy and the associated threat to self-determination are ... greater when the state is required affirmatively to regulate private pollution than where such regulation is preempted.... Thus the commerce clause should not be read as granting

> general federal authority to mandate state regulation of private pollution sources.[153]

This issue has been raised most sharply in cases in which states have challenged the authority of the EPA to force their acceptance of EPA-drafted transportation controls as a part of their state implementation plans. Although decisions have been mixed, several courts have given clear indications that the EPA scheme exceeded federal power under the commerce clause and violated the rights of states under the Tenth Amendment.[154]

An example of these rulings was provided in *District of Columbia v. Train*.[155] The court of appeals rejected elements of an EPA-promulgated SIP that would have required several jurisdictions to adopt and enforce automobile inspection, maintenance, and retrofit programs. It declared:

> In essence, the Administrator here is attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles.
>
> ... under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.[156]

Although the Supreme Court has not taken a definitive position on these issues, such rulings in the lower courts caused the Environmental Protection Agency to modify its stance. According to Henderson and Pearson,

> Five federal courts of appeals have rendered decisions on the issues thus raised. Three have held, and the Administrator now concedes, that the 1970 amendments did not confer authority upon him to order states to prepare and to enact into law regulations relating to transportation controls. The Administrator, however, has continued to insist upon his authority to compel the states to enforce [transportation controls], and has emphasized the practical necessity of relying upon state enforcement procedures.[157]

In sum, the Commission questions the move toward overarching national supremacy under certain partial preemption statutes. Neither the traditions of federalism nor the the Constitution itself can be readily squared with laws which "conscript" state legislatures and employees into the service of the federal government. Congress, then, should review all such statutory provisions, modify those found conscriptive, and avoid imposing similar requirements in the future. Only if state participation in federal partial preemption programs is truly voluntary—as it is under most of these statutes—can the rightful role of the states be preserved.

On the other hand, the Commission is aware that its position does not represent the dominant legal view. Although the *Clean Air Act* and similar laws have been soundly criticized as inordinately complex and inefficient, most of the affected parties have accepted the basic legal structure. Wisely or not, the Congress has determined that the goal of achieving environmental quality and the practicalities of administering such programs in a large and diverse nation justify federal coercion of state participation. Thus far, the Supreme Court has not dissented from this judgment.

FULL FEDERAL PREEMPTION AND ASSUMPTION

The foregoing proposals are each, in some respect, intended to improve the operation of partial preemption programs by increasing federal respect for the partnership role which states should play in their implementation. Yet, there are critics who believe that certain urgent national goals require rigid, uniform national regulatory policies if they are to be achieved. In their view, excessive reliance upon the states has been detrimental to realizing federal objectives, while any movement toward increased state 'flexibility" threatens a further watering-down of national standards. Some have expressed concern that federal regulatory relief efforts might result in a patchwork of conflicting state standards.

From this perspective, it may be argued that a stronger, more direct national role in priority areas is called for, involving the full federal preemption of regulatory responsibilities, together with uniform national administration and federal assumption of all associated costs. Those concerned about protecting the independent status of the states also might agree that preemptive federal action in selected areas is preferable to ever-tightening efforts to coerce state conformity to federal regulatory mandates.

Full preemption, of course, has been the traditional strategy. Beginning in the late 1880s, the national government began a pattern of preempting state laws in many areas of national concern, and established a host of federal regulatory agencies, led by the Interstate Commerce Commission. These limited the jurisdiction of the states, but—unlike partial preemption—did not affect their internal operations or compromise their autonomy.

A proposal to cut the tangled web of intergovernmental relationships by centralizing some key regulatory policy areas while devolving others would be quite consistent with past positions of the ACIR. Most recently, in its study *The Federal Role in the Federal System: The Dynamics of Growth*, the Commission proposed "decongesting" the federal grant system by nationalizing certain welfare functions while eliminating assistance in a host of lesser areas.[158]

Such a proposal might also be consistent with the objectives of President Reagan's New Federalism initiatives as proposed in his 1982 State of the Union message. That plan, like the Commission's own, was designed to clarify the balance of responsibilities within the federal system, in part by providing a cleaner separation of certain major functions.

At the same time, any proposals to make fully federal additional areas of regulatory activity would be apt to attract opposition, and no consensus has yet emerged around specific actions. On the contrary, many state and local governments have expressed concern about the steadily growing sphere of federal supercession, with recent controversy centering on such fields as cable television franchising, nuclear power plant siting and waste management, usury laws and offshore oil drilling.

On this basis, then, it would seem that specific proposals for full federal preemption would have to be assessed most carefully. The Commission nevertheless urges that, in those few regulatory areas where partial preemptions cannot—for whatever reasons—be converted into functioning, cooperative ventures of federal-state partnership, full federal preemption be considered by Congress. Such preemptive programs might either be administered and enforced by federal personnel or, purely as a matter of administrative convenience, by the states on a wholly voluntary, contractual basis. In either instance, full program costs should be borne by the national government.

Recommendation B.3

Direct Order Mandating and the Protection of Integral State and Local Governmental Functions

On June 24, 1976, the United States Supreme Court ruled in *National League of Cities v. Usery*, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the *Fair Labor Standards Act* (FLSA) were not Constitutionally applicable to the integral operations of the states and their political subdivisions in areas of traditional governmental functions. As examples of such functions, the Court listed fire prevention, police protection, sanitation, public health, and parks and recreation.

The Commission finds that this Constitutional principle has been construed very narrowly by the executive branch. One of the most troublesome examples of infringement upon the states' Tenth Amendment rights has been the Department of Labor's (DOL) designation of certain state and local functions as "nontraditional" for the purpose of applying the *Fair Labor Standards Act* (FLSA) minimum wage and overtime provisions to a substantial number of state and local employees.[159] The following functions have been designated as nontraditional by DOL:

1) local mass transit systems;
2) generation and distribution of electric power;
3) alcoholic beverage stores;
4) off-track betting corporations;
5) provision of residential and commercial telephone and telegraphic communications;
6) production and sale of organic fertilizer as a by-product of sewage processing;
7) production, cultivation, growing or harvesting of agricultural commodities for sale to customers; and
8) repair and maintenance of boats and marine engines for the general public.

The Commission believes that certain of these functions are indisputably integral state or local governmental activities. Therefore,

The Commission recommends that the Department of Labor rescind 29 C.F.R. Section 775.3.

If any portion of the United States Constitution is considered by the general public to be more inviolate than the rest, it is probably the Bill of Rights. Indeed, while both ebb and flow have characterized interpretation of the nation's chief legal document over the past two centuries, the rights protected by the first ten amendments have experienced almost universal flow and very little ebb. To this generalization, however, there is a notable exception: the Tenth Amendment. Thus, while Congressional statute, administrative ruling and judicial opinion have extended existing rights under, and even fashioned new rights from the first nine articles of the Bill of Rights, the Tenth Amendment, by 1941, had been demoted in stature to the ranks of a mere Constitutional "truism"[160]—more akin to "conventional wisdom" than "supreme law of the land."

The success of this judicial downgrading is evident, at the very least, in a general ignorance about the amendment. More telling, and legally more significant, efforts by the states and their political subdivisions over the past 46 years to stem perceived federal encroachments by employing a Tenth Amendment defense have been largely unsuccessful—again, a generalization with a notable exception. As noted earlier, in *National League of Cities v. Usery*,[161] the Court held that the Congressional commerce power—absolute and controlling in most of its uses—is circumscribed by other provisions of the Constitution.

Yet, as was indicated in *Recommendation A.3* above, the *NLC* decision left many issues unresolved, and it has failed to become the cornerstone of a revolution in federal-state-local relationships that some more hopeful observers anticipated. The Court itself has failed to expand upon its *NLC* protections, and the executive branch, in turn, has shown little self-restraint.

On December 29, 1979, the Department of Labor published FLSA regulations affecting a broad range of state and local activities. These rules, since codified under 29 C.F.R. Section 775.3, are regarded by many as among the most blatant of federal direct orders, and have been denounced by both NLC and the National Association of Counties (NACo). NACo has called upon the "President and the Secretary of Labor to suspend and review the ... ruling on traditional and nontraditional state and local functions...,"[162] while NLC has recommended outright rescission.[163] Particularly obnoxious to both groups were the inclusion of "local mass transit systems" and "generation and distribution of electric power" among DOL's nontraditional activities.

For instance, based on proportional ownership, an excellent case can be made for defining mass transit as an integral, if relatively recent,[164] governmental function:

> ... 90% of transit revenues, 91% of transit miles and 91% of all linked passenger trips are attributable to publicly operated mass transit systems, and 47 of the 50 largest systems are publicly owned.[165]

Such statistics make clear that, if not in the same venerable, "traditional" category as police protection, mass transit has become a significant local function. In November 1981, the U.S. District Court for San Antonio agreed with that position, asserting that

> . . .local public mass transit systems . . . constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities v. Usery.*[166]

Judge Shannon, who rendered the judgment in the San Antonio case, is not alone in this view. In 1982, the First Circuit Court of Appeals ruled in a case involving the Puerto Rico highway authority that its

> . . . operation of mass transit system, rental of parking lots, and collection of highway tolls are "traditional governmental functions" that are not subject, by virtue of the Tenth Amendment, to minimum wage provisions of the *Fair Labor Standards Act.*[167]

Unfortunately, the Supreme Court appears to disagree. In *United Transportation Union v. Long Island Rail Road* (1982),[168] the Court found that application of the *Federal Railway Act* to employees of the state-owned Long Island Rail Road did not impair the state's ability to carry out its sovereign functions. Although that case was not concerned with the FLSA, the Court did make the generalization that the operation of railroads is not a "traditional" state or local activity and therefore is not protected by the Tenth Amendment. That opinion, however, did not stop Judge Shannon from ruling, for a second time, that FLSA was unconstitutional as applied to transit. Shannon premised his judgment on the fact that local bus systems, unlike railroads, have never been subject to federal regulation.[169]

Both NLC and NACo contend that the generation and distribution of electric power, like mass transit, may reasonably be included among the integral activities of government. Thus, NLC notes that "many municipalities, particularly in the midwest, have long provided electric power to their citizens."[170] Though not predominently a public function, a sufficient percentage of public ownership exists among electric utility generating plants[171] to warrant a closer look at the function in relation to the FLSA requirements.

Finally, a compelling Constitutional argument can be made for defining the sale of alcoholic beverages as an integral state function. Hence, the 21st Amendment to the Constitution, which repealed the prohibition on liquor, made "local, not national, regulation of the liquor traffic . . . the general Constitutional policy."[172] According to Professor Laurence Tribe of Harvard:

> . . . [t]he 21st amendment does grant states considerable power to control the importation of alcoholic beverages. The amendment sanctions state action which taxes, regulates or completely bars the importation of liquor for actual use within the state itself, even where such action would be forbidden [under the commerce clause] as to any other commodity.[173]

As the foregoing pages suggest, pervasive intergovernmental confusion, if not friction, has characterized the debate over the Constitutional status of state and local functions since *NLC*. Simple answers do not exist and more intricate answers have not been forthcoming.

Clearly, on one plane, some answers lie in agency consultation with appropriate state and local officials and, conceivably, with statutory instructions. Yet, it is to the courts, and ultimately the Supreme Court, that we have traditionally looked for clarification and definition—more so, perhaps, in the realm of relations within the federal system than in any other.

In *Recommendaton A.3*, above, the Commission urged the federal judiciary to revive and expand upon the principles expressed in the *NLC* case. At the same time, this Commission also made clear its view that *all three* branches of the national government need to reconsider current interpretations of the commerce and spending powers as they apply to the newer and more intrusive forms of federal regulation affecting the states and localities.

In this particular instance, the Commission believes that a rescission by the Department of Labor of 29 C.F.R. Section 775.3 would be consistent with the spirit of the Constitutional interpretation expressed by the Supreme Court in the *NLC* case. Furthermore, such action would eliminate an important area of intergovernmental conflict. This curb on state and local prerogatives was instituted by the national executive branch and it can be removed by the same actor.

Recommendation B.4

Administration of Generally Applicable (crosscutting) Grant Requirements

The Commission finds that crosscutting requirements, because they apply to all or most grant programs, have had a pervasive impact on state and local governments and have been the source of significant administrative and fiscal burdens. Many of these requirements—such as those directed toward preventing discrimination and protecting the environment under federal programs—do address important and widely accepted national goals. As this Commission pointed out in both 1978 and 1981, there is a pressing need to ensure that crosscutting requirements continue to foster achieving national policy objectives in an effective manner and do not outlive their usefulness. Hence,

The Commission recommends that the President and Congress examine all applicable statutes and regulations and modify or eliminate, by statutory action where necessary, crosscutting requirements that have proven to be excessively burdensome, impracticable to implement, or otherwise no longer worth the effort required to implement them.

Whatever crosscutting requirements are retained should be administered effectively and efficiently by federal agencies.

The Commission therefore commends the President's Task Force on Regulatory Relief for initiating a process that highlights the unnecessary burdens imposed on state and local governments by particular crosscutting requirements.

The Commission believes, moreover, that effective and efficient administration of these requirements is impossible unless federal agencies share a common interpretation of Congressional intent and employ uniform implementing procedures, and, therefore,

The Commission reiterates its 1978 recommendation that Congress and the President assign each crosscutting requirement to a single unit within the executive branch, with clear responsibility and authority for achieving, in consultation with other affected federal agencies as well as state and local governments, standardized guidelines and simplified administration for effective compliance by all affected federal agencies; and that the Office of Management and Budget be authorized to establish a uniform procedure for developing, implementing and evaluating all such guidelines and monitor their administration. To these ends, the Commission also reiterates its support for the enactment of Title III of the Federal Assistance Improvement Act of 1981 (S 807) as introduced.

Because crosscutting requirements normally apply to all federal aid programs, they can be a major source of administrative complexity and red tape even in those areas, such as block grants, where Congress intends to simplify administration and decentralize decisionmaking responsibility. Therefore,

The Commission recommends that Congress provide a clear statutory indication of those crosscutting requirements applicable to each block grant and of how responsibility for implementation is to be shared between the national government and recipient jurisdictions.

Grant requirements that apply to many or all grant programs suddenly proliferated over the last two decades. Most of these "generally applicable" or "crosscutting" requirements were promulgated to further national socioeconomic policy objectives, such as nondiscrimination, environmental protection, and labor, health, welfare and safety standards. Others were designed to achieve administrative and fiscal policy goals in such areas as employee standards, administrative and procedural requirements, recipient-related administrative and fiscal requirements, and access to information. Currently there are 35 socio-economic and 23 administrative and fiscal crosscuts, for a total 58. Some of the most important ones are listed chronologically by year of adoption in *Figure 7–2*.

Figure 7–2

Selected Major Crosscutting Requirements (by year of adoption)

Davis-Bacon Act	**1931**[1]
Civil Rights Act (Title VI)	**1964**
Architectural Barriers Act	**1968**
Civil Rights Act (Title VIII)	**1968**
National Environmental Policy Act	**1969**
Clean Air Act Amendments	**1970**
Uniform Relocation Assistance and Land Acquisition Policies Act	**1970**
Coastal Zone Management Act	**1972**
Education Amendments (Title IX)	**1972**
Federal Water Pollution Control Act Amendments	**1972**
Endangered Species Act	**1973**
Flood Disaster Protection Act	**1973**
Rehabilitation Act (Section 504)	**1973**
Family Education Rights and Privacy Act	**1974**
Safe Drinking Water Act	**1974**
Age Discrimination Act	**1975**

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[1] Although the *Davis-Bacon Act* applied initially only to direct federal construction, it has since been extended to some 77 federal assistance programs.

ACIR examined crosscutting requirements in its 1978 comprehensive study of the federal grant-in-aid system.[174] and in its 1980 report on the role of the federal government.[175] It found that, despite the policy significance and profusion of these regulatory devices, congressional oversight committees and executive agencies administering grant programs rarely give adequate attention to the serious impact of these conditions on effective program implementation or to the administrative burdens placed on state and local recipients. The requirements raise administrative costs and frequently create conflicts with the primary objectives of the grant programs themselves. Compounding the problem is the fact that the requirements are specified in numerous laws and administered by many different agencies.

To deal with these and other problems identified in its studies, the Commission adopted recommendations principally calling for:

- ☐ Congress and the President to review all crosscutting requirements for the purpose of consolidating, simplifying or terminating them as needed, and for Congress to give the President standby authority to suspend temporarily implementation of the requirements when necessary to avoid serious or unanticipated costs or disruptions.
- ☐ Congress and the President to assign each requirement to a single administrative unit with clear responsibility and authority for achieving standardized guidelines and simplified administration.
- ☐ The Office of Management and Budget (OMB) to establish a clearinghouse for all such requirements and to monitor their administration.

Since the Commission's 1978 report, there has been growing recognition that crosscutting requirements add unnecessary administrative costs, create confusion between grantors and grantees, reduce the effectiveness of many national policies, and further complicate an already complex grant system. In late 1978, ACIR undertook a federal assistance monitoring project in response to President Carter's request for assistance in streamlining federal aid administrative practices. The monitoring was conducted by a panel of 17 state and local officials assisted by ACIR staff. One of its four recommendations to the President urged further standardization and simplification of crosscutting administrative requirements.[176]

Attention to the need for reform also has come from public interest groups, OMB, the Presidential Task Force on Regulatory Relief and Congress. Over the past few years, most of the national associations of elected state and local officials have issued statements substantially supporting ACIR's earlier findings, generally in response to a request for their ideas on regulatory reform from the Presidential Task

Force on Regulatory Relief. In its response, for example, the National Governors' Association (NGA) emphasized that "many regulatory requirements in individual programs reflect crosscutting federal concerns that would be better enforced in a single and consistent manner."[177] NGA recommended enactment of Title III of the *Federal Assistance Improvement Act of 1981* (S 807) which establishes a procedure for reviewing and standardizing crosscutting mandates. By this action, NGA contended,

> ... the federal government would be able to cut back on the number of generally applicable requirements, reduce the embellishments that federal program agencies have made on supposedly standardized requirements, rely more heavily on certification of compliance by state governments, and place the responsibility for oversight of remaining requirements in a single federal agency.[178]

Similarly, the National Conference of State Legislatures recommended easing the regulatory burden the national government has imposed on the states by simplifying federal regulations, including standardizing the "crosscutting requirements."[179]

The National Association of Counties (NACo) based its transmittal to the task force largely on a special seven-county survey it conducted on the effect of crosscutting requirements on county governments. NACo found "inconsistency among requirements and among federal agencies' application of standards, as well as the need for greater flexibility. . . ."[180] The common complaint that ran through the survey responses on all socio-economic crosscutting requirements was high cost and ambiguous and conflicting agency policies. NACo concluded that its survey

> ... reaffirms the findings of many previous studies on this same subject and substantiates NACo's longtime criticism of national policymaking through such means. Crosscutting requirements add excessive costs to federal projects, cause delays and most importantly, confuse the recipient's management process.[181]

The National League of Cities made recommendations to the task force on specific regulations. Its comments on many of the crosscutting requirements struck the same note: the need for simplification and standardization. It recommended that the *Uniform Relocation Assistance and Real Property Acquisition Act* regulations "be standardized where feasible in order to simplify compliance";[182] on Title VII of the *Civil Rights Act of 1964* relating to equal employment opportunity, it urged "standardized reporting and compliance procedures and . . . a procedure for annual certification of compliance with equal employment requirements";[183] and on governmentwide regulations prohibiting discrimination in federal programs on the basis of handicapped status, it recommended that the "administrative requirements of federal agencies ... be uniform and consistent."[184]

Within the executive branch, the principal focus on the issue of crosscutting requirements—prior to the creation of the Presidential Task Force on Regulatory Relief in 1981—came from a study conducted by the Office of Management and Budget pursuant to the *Federal Grant and Cooperative Agreement Act of 1977*.[185] OMB examined the crosscutting requirements as part of a general look at the management of federal assistance. A task group found a number of problems with the way the requirements were being administered:

- ☐ Responsibility for crosscutting requirements is so widely dispersed within the federal government that no formal process exists for uniformly communicating information about them to any federal agency.
- ☐ Some requirements emanate from a number of agencies in the form of various pieces of legislation, guidance, etc., so that the task of sorting them out and understanding their implications is complicated and time-consuming.
- ☐ There is often considerable delay between the time a requirement becomes a law and the time when official implementing guidance is issued to the agencies by the appointed lead body.

> ◻ No matter how consistent the framework may be in which federal policy requirments are transmitted to any agency, they are treated and implemented differently depending on the interest in and the attention paid to the contents prior to the formal introduction of the requirement into a department.[186]

As a result of the federal assistance study, President Carter directed OMB to develop and administer a process for coordinated development, issuance, implementation and evaluation of crosscutting assistance policy guidance. OMB subsequently prepared a proposed circular on "Managing Generally Applicable Requirements for Assistance Programs" that was published with a request for comment in the *Federal Register* on November 7, 1980.[187]

The circular's background statement highlighted familiar criticism of the legislative basis for and management of crosscutting requirements. The circular itself provided general policy statements to guide agency actions in managing crosscutting requirements and established the framework for such management, including specifying the responsibilities of federal agencies and OMB.

After expiration of the comment period, the circular was revised and prepared for approval and promuglation. Meanwhile, however, the Reagan Administration had taken office. Its diagnosis was generally the same as the previous Administration's:

> We found that the mandates were implemented in an inconsistent and unresponsive manner, and in some cases agencies were uncertain about who was responsible for assuring implementation. This confusion has had a tremendous adverse impact on state and local governments and businesses impacted by these requirements.[188]

The new Administration considered several approaches to correct the problem, including issuing the OMB circular prepared earlier. It rejected the latter "because it would do nothing more than impose a new layer of requirements without correcting the mandates."[189] The approach finally adopted was "to inventory and assess each mandate, and to then pursue revisions in statutes and/or regulations for those mandates where there is compelling evidence that change is needed."[190] This procedure makes use of the Presidental Task Force on Regulatory Relief, OMB and affected departments and agencies. The task force is reviewing some of the crosscutting requirements, including those provided by the *Davis-Bacon Act*, the *Rehabilitation Act of 1973 (Section 504)*, the *Architectural Barriers Act of 1968*, and the *Civil Rights Act of 1964 (Title VI)*. Other requirements are being reviewed by OMB or by previously assigned lead agencies. Steps also are being taken to designate a lead agency for each generally applicable requirement. Finally, under the leadership of OMB, the Administration is fashioning a policy for applying crosscutting requirements to the new block grants that is different from that used in existing block or categorical grants. Generally the new policy will give recipients greater discretion in determining which crosscutting requirements apply in particular situations, and how they apply.

Both the legislative and executive branches have confirmed ACIR's earlier findings about the difficulties created by the present system of crosscutting requirements. These difficulties were addressed legislatively in S 878, the *Federal Assistance Reform Act of 1980*, Title IV of which dealt with crosscutting requirements. Endorsed by ACIR, S 878 was passed by the Senate, but died with the 86th Congress when the House failed to act. Senator William Roth reintroduced a revamped version of this legislation in the 87th Congress—S 807, the "Federal Assistance Improvement Act of 1981"—which was supported again by ACIR and approved by the Governmental Affairs Committee in June 1981.

Reflecting hearings held by the Subcommittee on Intergovernmental Relations on S 878 in 1979 and on S 807 in 1981, the report of the parent Governmental Affairs Committee on S 807 supported and elaborated on ACIR's original findings on crosscuts in its 1978 report:

> Crosscutting requirements have become the focus of growing concern over the last few years as it has be-

> come increasingly apparent that such requirements add unnecessary administrative costs to grant programs, cause greater confusion between grantors and grantees, reduce the effectiveness of many national policies and help to create a grant system of incredible complexity. The applicability of general federal policy of crosscutting requirements varies widely.... In addition to the sheer number of crosscutting requirements is the fact that each requirement is implemented by regulations which differ considerably from agency to agency .... The confusion and poor coordination in the administration of crosscutting programs results as much from the lack of clear delegations of responsibility and authority as from the sheer number of generally applicable requirements....[191]

The Commission believes it is essential to reduce this regulatory burden by making certain that crosscutting requirements are still relevant to the national policy goals or management improvement objectives for which they were initially adopted. The currency, desirability and achievability of the goals should be examined as well as the suitability and effectiveness of the requirements for accomplishing them. As a first step, the President and Congress should take a hard look at all the authorizing statutes and regulations and recast or eliminate the crosscutting requirements that are no longer worth the effort and expense needed to carry them out. A second step will be to take all action necessary to improve the efficiency and effctiveness of those crosscutting requirements that remain.

The Commission notes that the President's Task Force on Regulatory Relief, headed by Vice President George Bush, already has examined some of the crosscutting requirements as part of its overall assignment to reduce the burden of government regulations on the private and public sectors. The Commission commends the task force for identifying burdensome and unnecessary regulations and for developing suggestions for strengthening and clarifying the administration of crosscutting requirements.

Although the Commission applauds these actions of the task force, it is convinced that more than a case-by-case approach is necessary to improve the administration of crosscutting requirements. On the basis of its earlier studies and the subsequent confirming testimony of others, it believes that a more comprehensive strategy is needed to establish greater uniformity among the requirements in interpreting Congressional intent and in establishing implementing procedures. The Commission's 1978 and 1980 recommendations called for such a well organized approach, capable of bringing consistency and predictability to the present variegated collection of 58 crosscutting requirements. The Commission therefore reaffirms these recommendations, urging particularly that the President and Congress designate a single agency to be responsible for providing standardized and simplified guidance in applying each crosscutting requirement, and that OMB be authorized to establish uniform procedure for developing, implementing, and evaluating such guidance and to monitor its administration. In developing and administering their guidelines, the designated agencies should take care to consult with other affected federal agencies as well as with the representatives of state and local governments.

As this recommendation indicates, the Commission believes that both Congressional and executive branch actions are necessary. On the legislative side, the Commission subscribes to the view of the Senate Governmental Affairs Committee:

> While it recognizes the efforts on the part of the Administration to confront the crosscutting issue, the committee is convinced that legislation is needed both to provide a foundation and enforcement tool for OMB initiatives and to eliminate the statutory road blocks which currently prevent the implementation of an adequate system to streamline and standardize crosscutting regulations.[192]

As noted earlier, the Commission endorsed S 807 as introduced in 1981, and hereby reaffirms that endorsement. Title III of S 807 mandates a process for developing and implementing standards and guidance for these regulatory devices. The President is directed to designate a federal agency to develop national policy assistance standards for each generally applicable requirement unless a specific agency is already designated pursuant to statute. The designated agencies are required to develop standards in their areas of responsibility in consultation with affected assistance recipients, program beneficiaries, and other assistance-administering agencies. The national agencies must publish their standards within two years of enactment and include a list of the programs to which the standards apply. Ultimate responsibility for developing standards rests squarely with the designated agencies.

Assistance agencies, which currently number some 44 bureaus or offices, are required to conform to the national policy assistance standards published by the designated agencies. These assistance agencies—not the designated units—would exercise sole responsibility for implementing and securing compliance by recipients.

Title III gives grant-administering agencies authority to allow grant recipients to certify that they are in compliance with state or local requirements comparable to federal standards and statutes, thereby easing the compliance burden associated with crosscutting requirements. To issue such certification, the assistance agency must determine that state and local requirements are at least equal to applicable federal requirements and that state and local applicants are in compliance with their own requirements.

To assure that Title III is implemented effectively, the legislation gives the President, or a delegated agency (such as OMB), specific authority to establish a uniform procedure for developing, implementing, and evaluating national policy-assistance standards. In addition, the President is authorized to delay implementing certain crosscutting requirements if it appears that they could lead to serious, unanticipated consequences if implemented without change.

The issue of which crosscutting requirements apply has been raised by the seven new Health and Human Services block grants and the Community Development-State Program block grant of HUD that were enacted through the *Omnibus Budget Reconciliation Act* of 1981 for which implementing regulations were issued by early June 1982. The interim rule on the Community Development Block Grant-State Program specified that OMB circulars A–102, A–87, and A–95 (Evaluation, Review and Coordination) were not applicable to the program but explicitly applied the prohibitions against discrimination and mandated compliance with the purposes of the *National Environmental Policy Act of 1969* and the requirements of "other applicable laws". The interim rule deferred comment on the "other applicable laws" pending further departmental study.

Concerns voiced by members of Congress and by state and local government representatives over the absence of references to other crosscuts contributed to the delayed publication of the final HUD rule. When it came out, the rule contained a section on "program requirements." This section identified the following crosscutting requirements as applicable to the CDBG-State Program: the various prohibitions against discrimination, the Davis-Bacon minimum wage requirements, environmental standards, and lead-based paint poisoning prevention. In the accompanying commentary, HUD noted that the mandates so listed are those which are referred to in the *Omnibus Budget Reconciliation Act* or for which the Secretary of HUD has enforcement responsibilities. It also noted that the issue of applying the uniform relocation crosscut had been referred to the Department of Justice for determination and that responsibility for administering the requirements assuring equal employment opportunity and prohibiting political activity of governmental employees was vested in other departments.

These two sets of regulations identify the specific crosscuts that do and do not apply to each of the programs. They offer no further guidance to the states and thus leave two questions open:

- Which, if any, of the many crosscutting requirements that are not mentioned also apply to these programs? This question arises because in the past crosscutting requirements have been held to apply to grant programs even though the programs' legislation does not refer to such requirements.

- How are the grant recipients (usually the states) expected to implement the crosscutting requirements that are made applicable?

Formally, the national government has given the states no direct answers to these questions. Informally, OMB, which has played a leading role in preparing the HHS and HUD regulations, has advised states that they should take responsibility for deciding which other crosscutting requirements, if any, apply to these block grants and how the crosscuts are to be implemented. This position accords with the Administration's basic policy of giving broad discretion to the states in administering block grants.

Conscious of their susceptibility to federal audits and to third party suits, states have expressed uneasiness over the uncertainty of their responsibility for crosscutting requirements under the block grants.[193] In some cases they have requested more guidance from the federal government. Their concern was voiced in the negotiations over the final HUD regulations as well as in testimony before the Senate Governmental Affairs Committee. The Comptroller General has echoed this concern. Noting that by and large the *Omnibus Budget Reconciliation Act* and agency regulations are silent on crosscutting requirements other than those applying to civil rights, he states:

> HHS and the Department of Education have not clarified the applicability of these requirements in the regulations. In contrast, the Department of Housing and Urban Development regulations address the applicability of many crosscutting requirements and indicate that the department is deliberating on the applicability of others.
>
> Given the short time available to plan and administer the new block grant programs, states are just now considering these issues. Some state officials are uncertain as to the applicability of these requirements to the block grants and believe that federal advice on this matter would be helpful. We believe the Administration should clarify for the states whether they apply to the block grants. If the Administration considers an applicable requirement to be inappropriate, then it should propose remedial legislation to the Congress.[194]

The Commission believes that Congressional action is needed to provide better guidance to grantors and grantees on the crucial question of which crosscuts apply and which do not, and which political jurisdiction has responsibility for seeing that applicable requirements are properly implemented. To the degree such responsibility is shared, the legislation should make as clear as possible how it is to be shared between the national government and the recipient jurisdictions.

To summarize, crosscutting requirements—a regulatory device that has burgeoned with the proliferation of federal grants since the mid-1960s—are the source of confusion, uncertainty and excessive administrative burdens for state and local government grant recipients. The legislation and regulations establishing the requirements as well as the arrangements for implementing them need to be rationalized. The Commission believes that the proposals set forth in this recommendation would help achieve that rationalization. Those proposals include: (1) a critical examination of each requirement by the President and Congress to eliminate or modify those that no longer serve a useful purpose; (2) continued efforts by the Presidential Task Force on Regulatory Relief to spot excessively burdensome requirements and to suggest ways of reducing the burdens; (3) statutory and administrative action as called for by Title III of S 807 to assign clearly responsibility and authority for achieving standardized guidelines and for simplifying administration of each crosscutting requirement and to establish OMB's central responsibility for guidance and monitoring; and (4) clear legislative specification of which crosscutting requirements are to apply to block grants and how responsibility for their implementation is to be shared between the national government and recipient jurisdictions.

Part C

IMPROVING THE FEDERAL REGULATORY PROCESS

The Commission believes that considerable progress may be made in reducing regulatory burdens and improving regulatory performance through the case-by-case review of specific statutes and rules. Principles to guide such efforts were suggested in the foregoing recommendations.

Yet, the Commission is convinced that comprehensive, permanent regulatory relief efforts also depend upon systematic improvements in the processes that surround intergovernmental regulation. The development of an effective intergovernmental partnership requires that state and local concerns be appropriately weighed at each stage in regulation—in developing and drafting rules as well as in refining, implementing and evaluating them.

Hence, the Commission offers a series of recommendations to improve the structure and procedures that surround federal regulation. Taken together, these five recommendations apply to most of the stages of the regulatory process mentioned above. Some are directed at the period in which regulations are developed and drafted, and others to the period during which proposed rules are refined in response to public comment. Still others concern the implementation of regulatory policies.

Proposed rules are shaped and reshaped during several phases of regulatory policymaking. The first stage, commonly called the "pre-notice and comment" period, may take years. It begins with a legislative provision, followed administratively by its conceptualization as a policy, and finally the drafting of that policy in the form of a proposed rule or rules to be published in the *Federal Register. Recommendations C.1 and C.3* refer to this stage of rule development.

The publication of a notice of proposed rulemaking (NPRM) marks the beginning of the second stage of regulatory policymaking and the point at which rulemaking procedures are prescribed by the *Administrative Procedure Act*. This stage includes the "notice and comment" period under which the public is afforded an opportunity to react to proposed rules. *Recommendation C.2* refers to this period during which regulations are refined, but before they are published as final rules in the *Federal Register.*

Recommendation C.1

Increasing State and Local Government Participation in Intergovernmental Regulatory Policy Development and Regulatory Drafting

The Commission believes that many of the problems of intergovernmental regulation stem from inadequate participation by state and local governments in the process through which rules are developed. In part, this faulty participation results from the failure of the federal government to provide adequate opportunities for it throughout the rule making process. Therefore,

The Commission recommends that Congress and the Executive Branch recognize the right of state and local officials—both as individuals and through their national associations—to participate from the earliest stages in developing federal rules and regulations that have a significant impact upon their jurisdictions.

C.1(a): Amending the *Federal Advisory Committee Act (FACA)*

Consultation is further impeded by certain statutes that have been interpreted in ways which undermine opportunities that have existed. The Commission finds that FACA has been interpreted by federal agencies in a manner which unnecessarily obstructs early consultation by state and local officials in developing intergovernmental regulations. Therefore,

The Commission recommends that Congress amend the Federal Advisory Committee Act to exempt from the requirements of the act any national organization composed wholly of elected officials of state or local governments when acting in their official capacities or their representatives or representatives of their national associations when engaged in consultation with agencies for the purposes of rulemaking.* (Note on next page.)

C.1(b): Instituting a State and Local Government Consultation Process for Federal Agency Rulemaking

The Commission further recommends that the President adopt a process providing for full state and local government consultation with federal agencies on rulemakings expected to have significant intergovernmental effects, economic or noneconomic. The process should apply to grant as well as nongrant-related rulemaking. To ensure full consideration of the views of state and local governments, consultation should occur as early as practicable in the first stages of intergovernmental regulatory policy development and initial drafting, long before the publication of the Notice of Proposed Rulemaking in the Federal Register.

C.1(c): Providing a Statutory Basis for State and Local Governments' Consultation in Federal Agency Rulemaking

To provide a firm statutory basis for such a consultation process in all rulemakings of intergovernmental significance, the Commission further recommends that Title IV of the Intergovernmental Cooperation Act of 1968 which requires that all viewpoints—national, state, regional and local—shall be fully considered and taken into account in planning federal or federally assisted development programs and projects be amended to include regulatory programs of intergovernmental significance.

ASSURING STATE AND LOCAL PARTICIPATION

During the 1960s and 1970s an elaborate system of grants developed, linking federal, state and local governments in the pursuit of national goals. Yet, for many years, no federal provisions for state and local consultation in federal grant administration existed. Circular A–85, issued by the Bureau of the Budget in 1967, began to fill this gap. The resulting process was intended to offer state and local governments the opportunity to review and comment upon major proposed federal regulations, rules, standards, procedures and guidelines that significantly affected them. The circular set forth guidelines to be used by federal agencies in determining which of their regulations were to be channeled through the consultation process. Whenever possible, intergovernmental consultation was to take place early in developing such regulations.

Despite its initial promise, the public interest groups and others involved found A–85 less useful than anticipated and their participation was not always complete or continuing. Federal agencies' lack of cooperation and their failure to highlight proposed regulations of interest to state and local governments, some contended, contributed to this tendency. A–85 also required public interest groups to expend considerable staff time and dollars managing the process.

Overall, in its report covering the final program year, 1977, the Advisory Commission on Intergovernmental Relations concluded,

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*Representative Fountain requested to be recorded as opposing this recommendation on the following grounds:

> I agree that state and local officials, and their national associations, should have the right and the opportunity to participate fully in the development of federal rules and regulations affecting them. However, amending the *Federal Advisory Committee Act* to exempt state and local officials from the act's requirements appears to be both unnecessary and unwise. I am sure there are many ways in which state and local governments can express their views on proposed rules and regulations without becoming subject to FACA.
>
> This legislation was enacted to assure openness and accountability in the operation of federal advisory bodies. To exempt state and local officials and their national associations from the act's procedural safeguards would surely invite demands for the exemption of other groups and, ultimately, could lead to the destruction of an important federal law.
>
> I believe this is the wrong remedy if FACA has been interpreted by federal agencies in a manner which unnecessarily obstructs early consultation by state and local officials in the development of intergovernmental regulations. This, surely, was not the intent of Congress. The proper remedy, in my judgment, would be to elicit a more reasonable interpretation of the act's requirements within the executive branch.

"Many of the problems of previous years continue to hamstring the operation of Circular A–85."[195] It cited the failure of the public interest groups to respond to opportunities to comment or to respond in a timely manner, infrequent early consultation between public interest groups and agencies, insufficient time provided for state and local governments to comment, and the widespread tendency of agencies to begin the A–85 process simultaneously with regular public comment following publication of the "Notice of Proposed Rulemaking" (NPRM).

Although these shortcomings prompted some critics to regard A–85 as a vast "papermill," the Advisory Commission on Intergovernmental Relations took a more positive stand. In its 1977 report, the Commission expressed its support for such a consultation process and recommended strengthening A–85 by, among other things, giving it a specific statutory basis, which would make it less likely to be ignored or circumvented.[196]

Despite its problems, A–85 continued until 1978. It was then rescinded by President Carter's EO 12044 and replaced by a much less formal and decentralized process under which agencies and public interest groups were to contact one another directly on issues of intergovernmental importance that were raised by proposed rules. "In order to assure full state and local participation in the development and promulgation of federal regulations with significant intergovernmental impact...;"[197] President Carter asked the national organizations representing subnational general purpose governments to review systematically agencies' semi-annual agenda of regulations published in the *Federal Register.* Under the order, agencies were to expect informal contact by the public interest groups on proposed regulations of intergovernmental significance.

On February 17, 1981, President Reagan issued EO 12291 which revoked the previous order, 12044. With that rescission, the new Administration terminated the consultation process that the Carter Administration had substituted for the original A–85 process, effectively returning state and local governments to the position they regarded as unsatisfactory in 1966.

In short, the history of federal provision for state and local governments' participation in federal rulemaking has come full circle—from no special mechanisms in 1966, one year before the issuance of A–85, to a return to this situation in 1982, one year after the rescission of EO 12044. Now, as then, state and local governments are accorded the same privileges as the public generally—no more, no less.

Many state and local government officials believe that they ought to be provided special opportunities to participate in federal regulatory decisionmaking. Indeed, they argue that the tremendous growth of intergovernmental regulation has made adoption of a formal consultation mechanism more important now than ever before. The National Association of Counties, for example, has made "consultation" the basic premise of its regulatory reform platform.[198] The National Governors' Association has recommended that state participation in the development of federal regulations be upgraded to a "true partnership." In 1981, the association made this one of seven themes in the governors' "Green Book," *Eliminating Road Blocks to Effective State Government.*[199]

The extent to which state and local governments are regulated by the federal government and the full impacts of that regulation are not wholly known or quantified, but some indications are available. A recent *Calendar of Federal Regulations*, issued January 13, 1982, contained an index of "significant regulations" under development by federal agencies during the period covered by the *Calendar*. Analysis of this index shows that, of ten sectors identified, "state and local governments" stand second behind manufacturers as the sector most frequently affected by the federal regulatory activities described in the *Calendar*. Fully 31% of the regulations under consideration were expected to affect state and local governments. Such statistics have led one advocate of procedural reform to conclude:

> Congress should realize that the [subnational] partners in this [federal] system are under intense fiscal pressures, not the least of which stem from their cooperation in the hundreds of ... assistance and regulatory programs all amply prescribed by federal rules.[200]

Proponents of change also point out that achieving the federal goals that underlie these regulations depends in great part on their acceptance at the state and local levels. When state or local governments are unable or unwilling to affirmatively participate in implementing these rules, the federal effort itself is undermined. Hence, it is in the interest of the federal government—as well as of the states and localities—to ensure that rules are fashioned in a manner most likely to ensure their efficient and effective implementation. Advocates point to the fact that participation which is limited merely to written submissions offered during official periods of notice and comment is largely "reactive" in character. When consultations are thus limited, it is more difficult to elicit changes in agency proposals because, by that point, positions probably have hardened. Thus, reformers maintain, early and systematic consultation affords the best opportunity for state and local governments to suggest more efficient or effective alternatives and to identify sources of duplication, overlap and conflict with state law, local ordinance and custom—all leading to regulation more in keeping with the spirit of cooperative federalism.

These views were expressed in 1981 by the Senate Committee on Governmental Affairs which, in reporting the "Regulatory Reform Act," S 1080, concluded:

> The successful implementation of many federal programs depends on the cooperation of state and local officials. It is difficult to conceive how state and local officials can perform their regulatory responsibilities if they are not permitted to work with federal officers in developing rules they will enforce and to mesh federal regulations with state programs.[201]

Finally, those who would establish a process for state and local government participation in rulemaking apart from that provided for the public generally, believe that treating state and local governments in the same fashion as other interest groups ignores their unique Constitutional position. A federal system implies a full partnership in determining the details as well as the broad outlines of shared responsibilities. These details are by-and-large the result of rulemaking. Generally under the national legislative process, federal agencies are accorded broad discretionary authority to determine the detailed application of laws. They also have discretion in providing state and local governments access to that process, insofar as grant law conditions and other intergovernmental regulations are concerned. But most agencies have few incentives to do so. These facts, together with the Constitutional position of the states and their political subdivisions, lead this Commission to endorse a system of full collaboration that respects the legitimate roles of the partners in the federal system.

Others do not believe a formal process is necessary and they contend that arguments for it, though persuasive in theory, are not practical. A-85, they point out, did not work well. In addition, they maintain that sufficient opportunities already exist for "collaboration" in rulemaking. Agencies publish semi-annual agendas providing advance notice of proposed rulemaking. Nothing expressly prohibits state and local governments from contacting agencies during the period prior to publication of a Notice of Proposed Rulemaking (NPRM). Because this early period is not covered by the requirements of the *Administrative Procedure Act*, agencies may freely consult with states and local governments. In short, they believe that the public interest groups are overly concerned with obtaining a "special" mechanism for consultation when they should make full use of opportunities that already exist.

The Commission rejects these arguments. A formal, statutorily authorized process is needed. It should accord a clear and preferred position to state and local officials, both individually and collectively. To do any less than this would help to perpetuate the legal and operational myth that these jurisdictions differ in no significant way from a trade association, business, trade union, agricultural combine or individual. This fiction, the Commission contends, is untenable, since it totally ignores the Constitutional position of the states, and also the crucial functional role of both the states and their localities and delivering services.

MODIFYING THE FEDERAL ADVISORY COMMITTEE ACT

Apart from the question of an effective consultation process, any attempt to reform regulatory consultation, whether formal or informal, would fall victim to provisions of the *Federal Advisory Committee Act* (FACA) as it is now interpreted by federal agencies. The problem here centers on the application of FACAs stringent procedures to any gathering of public interest groups convened for the purpose of advising a federal agency or agencies.

The act defines "advisory committee" to mean "any committee, council, conference, panel, task force, or other similar group or any subcommittee or other subcommittee thereof . . . which is established by statute or reorganization plan, established or utilized by the President or established or utilized by one or more agencies in the interest of obtaining advice or recommendations."[202] Organizations deemed "advisory" for the purpose of the act must follow rigorous procedures such as timely notice of meetings, extensive documentation of all comments, and ample provisions for public attendance and participation.

FACA, of course, contributed to the termination of A–85 by OMB. Citing the AASHTO case[203] as the major decision in the area, the OMB general counsel in 1977 concluded that a *national* organization of state and local government representatives whose charter and actual operations include the objective of advising the federal government and whose advice is sought and utilized by federal agencies is *not* exempt from FACA section 4(c).

This interpretation of AASHTO by executive branch officials not only contributed to the decision to terminate the A–85 program, it also undermined the decentralized consultation process that followed during the Carter years. To avoid complying with FACA's rigid requirements, federal agencies often avoid early consultations with state and local governments in developing regulatory policies.

Both the Senate and House have sought to rectify this situation. An amendment to exempt state and local governments from FACA's provisions was contained in the proposed "Regulatory Reform Act" (S 1080, 97th Congress). An even broader exemption for all rulemaking consultations was contained in its House counterpart, "The Regulatory Procedure Act" (H R 746, 97th Congress). The seriousness of the FACA dilemma was underscored by the Senate Committee Report on S 1080, which defended the critical importance of maintaining the "working character" of meetings between the levels of government and concluded:

> The interpretation of this decision by executive branch officers has had serious repercussions in federal-state-local relations. Concern about compliance with the requirements of FACA has precluded discussion on regulations for programs where state and local government officials are called upon to assume enforcement responsibility.[204]

In offering the original FACA amendment during the Governmental Affairs mark-up of S 1080, the Committee was responding to the urgings of many public interest groups including the National League of Cities, the National Association of Counties, and the National Governors' Association. For example, the Executive Director of the National League of Cities stated:

> In particular, we believe that the *Federal Advisory Committee Act* (FACA) should be amended to permit greater consultation with elected officials from general purpose state and local governments. . . . We recommend that FACA be amended to exempt elected officials of general purpose state and local governments, their organizations and their representatives from coverage. Such a change would recognize the unique role of states and local governments in the federal system. Under the federal system, states and local governments should receive the rights and privileges of partners in that system. Permitting early consultation would go a long way towards restoring balance to the system.[205]

Moreover, both the Ford and Carter administrations expressed concern about the problems generated by FACA. Most recently, the White House has taken an interest in removing barriers to ad hoc, informal rulemaking consultations between federal agencies and parties affected by proposed rules. On one occasion, it recommended that the Senate Committee on Governmental Affairs research the issue as part of its legislative regulatory reform efforts. Furthermore, Christopher DeMuth, the Director of the Office of Information and Regulatory Affairs and Executive Director of the President's Task Force on Regulatory Relief, has stated that "In setting up procedures for reviewing rules where outside groups are concerned, we have been very clear we don't want such contacts. Now, it is clear this isn't appropriate where state and local governments are affected and we need to do something about that."[306]

In light of the foregoing, the Commission recommends that Congress amend the *Federal Advisory Committee Act* to exclude from its coverage state and local officials as well as their representatives when they are consulting with federal agencies during any phase of the rulemaking process. Without this amendment, no meaningful consultations can occur and without effective consultation among the levels, many of the problems associated with intergovernmental regulation will persist.

AMENDING THE INTERGOVERNMENTAL COOPERATION ACT

Although amending FACA would go far to assuring full use of any consultation process, it also is necessary to amend the *Intergovernmental Cooperation Act* (ICA) to make such a process equally applicable to grant and nongrant rulemaking.

The ICA was adopted prior to the era of intergovernmental social regulation. Hence, it provides for consultation related to federal or federally assisted development programs, but it does not mention nongrant programs. In the past, this omission was used by some agencies as a means for avoiding consultation requirements under the provisions of A–85. Some have asserted that the act could not be applied to regulatory programs, such as those of the Equal Employment Opportunity Commission and Occupational Safety and Health Administration. In fact, throughout the life of the circular, no distinctions were made between different types of rules. Since A–85 provided enhanced opportunities beyond those provided by the *Administrative Procedure Act*, and because its use reduced confusion over differences between types of regulations, public interest groups routinely used A–85 for all their consultations.

OMB General Counsel William Nichols argued against continued OMB acceptance of this practice. In a memorandum to Vincent Puritano, then OMB deputy associate director of intergovernmental relations and regional operations, Nichols concluded that "The [*Intergovernmental Cooperation*] *Act* does not extend that [intergovernmental consultation] requirement to nonassistance regulatory programs and will not support the application of A–85 to such programs."[307] In summation, he said, "It is our opinion, therefore, that to the extent that A–85 applies to programs other than those identified in Section 401(b) of the *Intergovernmental Cooperation Act* [these being financial in nature], it has exceeded the authority granted under the act."[308]

Conceivably, these same arguments could be applied against any newly initiated consultation process, thus greatly limiting its effectiveness. Hence, the Commission strongly urges that the *Intergovernmental Cooperation Act* be amended to extend the Congressional mandate for consultation to regulatory as well as grant programs and policies.

Amending the *Intergovernmental Cooperation Act* would provide a clear statutory basis for a comprehensive consultation process. Yet, there are some who believe that this kind of reform is unnecessary and inadvisable. Simply removing the impediments imposed by FACA would, from this view, clear the way for successful consultation, and this is all that is needed. Amending the *Intergovernmental Cooperation Act* would raise expectations about what a consultation process should consist of and, it is charged, lead to burdensome overformalization. If the process were to mandate review and comment, for example, it would raise serious questions of cost, delay and "paralysis by analysis." Such a process would, by *itself*, hinder the "working character" of consultation so important to successful collaboration. Thus, some officials believed that no process should be required beyond a simple notification of the relevant public interest groups, with no amendment of the *Intergovernmental Cooperation Act*.

In contrast, the Commission supports a full reform effort—which includes amending the *Intergovernmental Cooperation Act*—and believes that far more than mere notification is needed. Such notification procedures, after all, were in place during much of the period in which the federal regulatory role grew larger and more coercive. While conceding that A–85 did not always operate smoothly, the Commission is convinced an alternative process of collaboration can be developed. In a federal system, like ours, some such process is necessary to safeguard state and local rights to participate in national regulatory policymaking and this process must be based firmly and clearly on affirmative Congressoinal enactments.

Recommendation C.2

State and Local Participation in The Notice and Comment Stage of Rulemaking: Including Federal Grants and Loans Under the Administrative Procedure Act

Since 1946, the *Administrative Procedure Act* has been the guarantor of minimum legal rights of public participation in federal agency rulemakings. Under one of its provisions, however, rulemakings relating to "agency management or personnel or to public property, *loans, grants, benefits* or *contracts*" have been exempted from such participation requirements.

The Commission finds this exclusion detrimental to full participation of state and local governments in federal grant and grant-related rulemakings and to ensuring the minimum legal rights of the state and local governments in such procedings. Therefore,

The Commission recommends that Congress amend provision 5 U.S.C. 553 (a)(2) of the Administrative Procedure Act to eliminate its exemption of grants, loans, benefits and contracts from Notice and Comment rulemaking requirements.[209]

5 U.S.C. 553 (a)(2), which is part of the "proprietary clause" of the *Administrative Procedure Act*, exempts agency rulemaking related to loans, grants, benefits or contracts from public participation requirements. Thus, on grant-related regulations, agencies enjoy broad discretion as to whether—and under what conditions—to consult with state and local governments. As the grant-in-aid system has grown, there often have been communications among the levels of government about proposed grant requirements. But such consultation too often is of a technical rather than policy nature and too seldom is undertaken in a cooperative spirit.

Over the years, arguments about the advisability of proprietary exemptions have focused on achieving a balance between the public's right to administrative accountability versus the bureaucracy's need for flexibility in administration. Participation, it is believed, protects democratic values in bureaucratic rulemaking. In particular, participation by state and local governments protects their full partnership in the federal system. Furthermore, in the face of possible bureaucratic abuse, participation guarantees "legal remedies" that would not otherwise exist.

On the other hand, the price of increased participation must be measured against other societal values that might be sacrificed to achieve it. As one authority pointed out,

> Widespread participation in the rulemaking process is an important goal which ought to be pursued as far as possible; but, it must be reconciled with the undoubtedly important, competing societal interests favoring the efficient, expeditious, effective and inexpensive conduct of our government affairs.[210]

The decision to change those provisions of Section 553 that are of intergovernmental significance hinges on this trade-off. The key question is: Are the current problems generated for state and local governments and for maintaining balance in the federal system important enough to justify modification or repeal of exemptions for grants, loans, benefits and contracts?

Although the current Administration has expressed no objection to amending the *Administrative Procedure Act* along these lines, historically the executive branch—most notably the agencies themselves—have justified the exclusion of grant rulemakings in both practical and philosophical terms. Any change, it has been argued, would increase government costs and agency workloads. In many cases, the argument runs, such consultations are not that vital; in others, they would lead to more litigation and further delays in promulgating important rules.

On philosophical grounds, federal agencies assert that these kinds of rulemakings are different from "regulatory" rulemakings. Hence, such rulemakings are properly excluded from usual procedures because there is no "right" for any member of the public to use federal public property, receive a loan, grant, or benefit from the government, or to make a contract with the federal government. In contrast, these are all "privileges." If state and local governments do not like the terms upon which these privileges are made available, they can refuse to accept the privileges and thereby avoid submission to their conditions. Consequently, rulemaking in relation to federal grants and loans should be treated differently than rulemaking relating to other federal government functions.[211]

The Commission disputes both rationales. It regards as fallacious the argument that grant rulemakings should be exempt because grants are a "privilege" and somehow part of an essentially voluntary contract. To assert that intergovernmental aid is a luxury, rather than a necessity, ignores the fiscal realities faced by many state and local governments.

The Commission also believes that such exemptions have created substantial problems for state and local governments in carrying out their responsibilities in the federal system. These problems are exacerbated by the fact that it is unclear what is or is not "grant-related" and where authority to make this distinction lies. In the first place, such exemptions have meant that subnational governments have no legal rights or remedies against agency abuse in rulemaking. Furthermore, the exempted subjects constitute a significant proportion of all intergovernmental regulation. Finally, the issues at stake are crucial:

> The particular classes of rulemaking excluded by it are . . . of especially great qualitative importance to particular segments of our society, to the public-at-large, and to our national effort to cure the pressing human problems of the last half of the 20th century. That is, most rulemaking excluded from section 553 by subsection (a)(2) relates to programs, or functions or techniques for governing, which have an unusually large impact on the daily lives of tens of millions of Americans. Efforts to solve our urban crisis, racial problems, poverty problems, environmental quality difficulties, and human spirit and character maladjustments as examples, have mainly been pursued through the use of "public" property, loans, grants, benefits or contracts.[212]

Reform is strongly supported by many experts in the fields of administrative law and governmental management. Their findings suggest that the societal benefits to be gained from participation far outweigh the losses in agency discretion. As far back as 1955, the Task Force on Legal Services and Procedure of the Hoover Commission noted: "Many rules governing proprietary matters, such as procedures respecting public property, loans, [grants], benefits, and contracts are of vital importance." The task force concluded that "Proprietary functions may . . . be effectively executed by agencies with public participation in the rulemaking process" and was convinced that 5 U.S.C. (a)(2) providing such exemptions should be repealed.[213]

Similarly, in the late 1960s, the Administrative Conference of the United States (ACUS) called for the complete deletion of the proprietary exemption on the basis that the "good cause" exemption from the *Administrative Procedure Act* is sufficient to allow any necessary exemptions.[214] In regard to grants, loans, benefits or contract exemptions, it concluded that agencies certainly must be able to take speedy actions in emergency situations or in instances where the proper performance of their functions otherwise requires it. Although there may be certain cases where the delay and cost involved in according public, state and local participation are so high in relation to the benefits that adherence to formal notice and comment procedures becomes unreasonable, ACUS contended that these arguments do not justify the current unqualified exemption of all such rulemakings:

> Experience with the section 553 procedures as applied to [these] kinds of rulemaking . . . suggests that these consequences are not likely to be frequent, great or detrimental in the mass of subsection (a)(2) situations as advocates of the exemption claim. Furthermore, the consequences of subjecting the present exempted subsection (a)(2) classes of rulemaking to the requirements of section 553 have not been demonstrated to be so much more deleterious than the similar consequences incurred when other rulemaking was included under the provision, as to suggest a need for the former's special treatment on this basis.[215]

The views of these experts are widely shared by the public interest groups, who have argued that exemptions have contributed to the overly rigid character of much recent federal grant regulation.

In light of these arguments, the Commission is convinced that a system establishing minimum legal rights and remedies against agency misconduct in grant-in-aid rulemakings would improve prospects for early agency consultation with state and local governments. Effective consultation would help agencies "head off" litigation by working problems out early in the process, rather than after a judicial challenge.

In response to calls for reform, the Senate has taken action to repeal exemptions for grants, loans, benefits and contracts under the APA. Their repeal was contained in the proposed "Regulatory Reform Act" (S 1080, 97th Congress). But it was not included in a similar House version of the bill, "The Regulatory Procedure Act" (HR 746, 97th Congress).

In summary, the Commission urges early Congressional repeal of the exemption of grants and loans from the requirements of the *Administrative Procedure Act*. Arguments about the need for speed and agency flexibility, in its view, are not supported by the evidence. Federal policies implemented through grant regulations are highly significant. The problems generated by a lack of state and local participation in regulation drafting are quite substantial because these governments play a pivotal role in implementing grant-in-aid programs.

Recommendation C.3

Ensuring Consideration of Intergovernmental Effects in Agency Regulatory Impact Analysis and Regulatory Review

Federal intergovernmental regulations often are enacted without an adequate assessment of the potential costs that they impose on state and local governments and on the private sector. In 1980, the Commission recommended that Congress enact legislation requiring each federal department and agency, including each of the independent agencies, to prepare and make public a detailed analysis of the projected economic and noneconomic intergovernmental effects likely to result from any proposed major new rule.[216]

Since 1974, every President has required that agencies undertake some form of cost-benefit analysis of major proposed rules. The comprehensive regulatory review program initiated by President Reagan through EO 12291 provides for a regulatory analysis of all "major" rules as well as a less rigorous review of the probable impacts of nonmajor rules. The President's Task Force on Regulatory Relief also is undertaking a review of selected existing rules.

C.3(a): Consideration of Intergovernmental Effects

The Commission finds, however, that the implementation of executive branch regulatory review and analysis programs over the past three administrations has insufficiently recognized and considered the intergovernmental effects of regulations. The Commission also believes that, while the most recent executive order requiring agency analysis of proposed rules identifies intergovernmental costs as relevant for calculating expected costs, agencies have not been expressly required to include such costs in their analyses of major rules.

The Commisison finds that the benefits of regulatory programs often accrue to individual citizens or groups of citizens while many of their costs are borne by subnational governments and that these intergovernmental costs are not now fully considered in regulatory review. Therefore,

The Commission reaffirms its 1980 recommendation to the President that all federal agencies conduct regulatory analyses of proposed major rules and further recommends that agencies be required to incorporate into such analyses a full consideration of the intergovernmental effects—economic and noneconomic—of proposed regulations.

C.3(b): Redefining Major Rules

The Commission further believes, as public interest group studies have indicated, that agencies tend to underestimate the total impact of proposed rules and that many regulations presently defined as "nonmajor" by agencies in fact impose significant financial and nonfinancial costs on state and local governments. To help restore balance to the system, federal regulations requiring significant changes in how state and local governments operate should be categorized as major and be subject to cost-benefit analyses. Therefore,

The Commission recommends that the President, by executive order, expand the current definition of major rules to include regulations requiring state and local governments to make significant changes in their laws, regulations, ordinances, organization and fiscal affairs. The Commission further recommends that when state and local governments determine in the 60-day comment period that a proposed rule or regulation requires such changes, the federal agency should be required to designate the rule as major or to issue a statement indicating that no such changes are required, thereby establishing a judicially reviewable basis for its finding and enabling state and local governments to bring a court challenge to an agency's refusal to designate the rule as major.

C.3(c): Review of Nonmajor Rules

Although the Commission believes that regulatory analyses can be an important tool for reducing the overall burden of intergovernmental regulation, administative costs and practical considerations suggest that such analyses be conducted solely for major federal regulations. The Commission also believes, however, that nonmajor regulations represent a significant proportion of the total regulatory burden imposed on state and local governments. Therefore,

The Commission recommends that the President direct that in any review program or as part of the regulatory criteria established under such a program, full consideration be given to the intergovernmental effects—economic and noneconomic—that will be generated by any proposed rule.

Regulatory review is a process by which agencies themselves and those charged with their oversight bring systematic analysis to bear upon bureaucratic rulemaking in an effort to improve it and to reduce regulatory burdens. Although regulatory review often has been equated with cost-benefit analysis as it has been applied to "major rules," such review need not be limited to (or even include) economic analysis. In fact, the current regulatory review program required by Executive Order 12291 establishes a broad process whereby *all* proposed rules are evaluated—first by agencies and thereafter by the Office of Management and Budget—in accordance with certain regulatory principles outlined in the Order. As part of this review process, major rules—those expected to generate impacts in excess of $100 million—also are subjected to cost-benefit analysis.

In the view of public interest groups, most other observers, and this Commission, the new regulatory review program deserves praise for its efforts. Central oversight has long been overdue. Some officials, however, maintain that the new program, like its predecessors, focuses too much on the burdens federal regulations place on the private sector and too little on those it generates for subnational governments. This secondary concern for intergovernmental impacts is sufficient, the Commission believes, to warrant some modifications in the process.

The Commission, therefore, seeks the explicit inclusion of *all* significant intergovernmental effects, economic and noneconomic, in agency cost-benefit analyses for major rules as well as their consideration in agency reviews of nonmajor rules. OMB also would be required to take fully into account intergovernmental effects in its evaluation of all agency submissions as part of the review process.

Of special concern are those effects that often have not been incorporated in economic analyses in the past, either because they were not easily quantified or because it did not occur to agencies to include them. These omissions pose special problems for gauging intergovernmental effects because many are noneconomic. No definitive list of intergovernmental "noneconomic" effects yet exists, but most would fall into one of three broad categories. First, "administrative costs" result when regulations produce administrative inefficiencies by duplication, inconsistency or overlap in regulations. Second, "performance costs" are generated when regulations result in reduced levels of total services provided. Finally, "authority costs" arise if regulations undermine the political autonomy of state and local governments. Although these costs are hard to identify and to measure, the Commission believes that omitting them from agency evaluations results in significant underestimation of intergovernmental effects. In addition, the problems of identification and measurement could be greatly reduced were agencies to collaborate more fully with state and local governments in the early development of regulations.

Those who share a commitment to the regulatory review process, and to ensuring a full consideration of intergovernmental effects within it, differ in their views as to how this assessment should be achieved. Some feel quite strongly that, despite OMB evaluation of agency reviews, leaving the determination of intergovernmental costs to agencies will not result in proper estimates. This position was expressed by the National League of Cities, in its 1981 recommendation that Congress expand the definition of "major" to include all rules with significant intergovernmental effects.[217] Those holding this view warn that agencies are already given direction in the executive order to consider "costs on state and local government agencies." Apparently, such direction is not enough. Moreover, OMB must review thousands of proposed rules and it has neither the staff nor the time to undertake what should be an agency responsibility. From this perspective, agencies should be required to include such effects in their reviews. Failure to do so should raise the possibility of sanctions against agency officials.

To achieve this expansion, the Commission recommends that agencies be required to define as major all rules that require significant changes in state and local laws, regulations, ordinances, organization and financial affairs. When state or local governments have established that a proposed rule would generate such effects, OMB would require agencies to treat that rule as major. Both a cost-benefit test and the views of state and local governments then would be made a part of the rulemaking file. Should agencies knowingly refuse to designate such a rule as major or otherwise obstruct the full consideration of intergovernmental effects, state and local governments would have a basis for judicial review on the grounds of "arbitrary and capricious" behavior by the agency.

On the other hand, the Commission recognizes that some regulations have intergovernmental impacts which do not merit cost-benefit analysis. Cost-benefit analyses, after all, are expensive. By GAO estimate, their average cost is $125,000 per review. In the Commission's view, it is sufficient to remind agencies to include intergovernmental costs—both economic and noneconomic—in their consideration of minor rules. Hence, the Commission urges that the President require agencies, within the frame of the existing executive order, to consider fully intergovernmental impacts in all their reviews and analyses.

Recommendation C.4

An Omnibus Approach to State and Local Government Certification in Meeting Federal Rules and Regulations

The Commission finds that there is a great need to make compliance with federal regulations easier and less costly, and to reduce duplication of state and local regulations. Increasingly, states have developed programs and regulatory mechanisms for themselves and their local governments that respond to many of the same problems and concerns addressed by federal requirements. Certification of appropriate state and local compliance mechanisms in place of federal ones can help ease compliance burdens, duplication of effort, and displacement of state and local policymaking prerogatives. Therefore,

The Commission recommends that certification of state and local regulations, procedures, recordkeeping and reporting requirements be used increasingly by the federal government to avoid duplication by equivalent federal requirements.

To encourage greater use of such certification, the Commission recommends that Congress and the President enact legislation encouraging the heads of all federal agencies regulating state and local governments to consider accepting the substitution of state and local regulations, procedures, recordkeeping and reporting requirements in lieu of federal ones upon certification by the appropriate official or officials that applicable federal requirements will be met. Such self-certification shall no longer be accepted upon a finding by the head of the federal agency that the recipient government fails to comply with applicable federal laws and regulations adopted thereunder.

The Commission has gone on record twice before in favor of certification procedures that would substitute state and local procedures for related federal ones. In its report entitled *Categorical Grants: Their Role and Design*, it adopted a recommendation aimed at standardizing and simplifying the administration of generally applicable requirements in the federal grant system. Hence, it urged "that certification acceptance procedures be incorporated whenever appropriate."[218] In explaining this proposal, the Commission noted that:

> Another way to streamline the administration of generally applicable grant requirements is for the federal government to accept the results of planning and decisionmaking processes established under state law that are at least as demanding as the federal requirements. The "certification acceptance" technique might have particular applicability to requirements such as those for environmental protection, citizen participation, civil rights and prevailing wage rates where states have enacted similar legislation. The technique relies upon mutual trust between the federal government and the grant recipient plus auditing on a sample basis to help assure that recipient procedures really do provide compliance with the federal requirements.

The ACIR also has proposed using a cetification process for citizen participation requirements.[219] In justifyng this recommendation, the Commission stated that:

> ... If the recipients show that they have state and/or local laws and administrative procedures that offer citizens access to the decisionmaking process equivalent to that set forth in the performance standards of the act, they would be certified as meeting the participation requirements for any federal aid programs to which the act applied. Such certification, of course, would be subject to federal audit from time to time and to rescission upon a finding, after notice and hearing, that the recipient is not in compliance with the cited state or local laws and procedures or that such laws and procedures are not at least equivalent to the federal standards.

The Commission is not alone in supporting this approach. Approximately two months after the Commission adopted its *Categorical Grants* report in 1977, the Commission on Federal Paperwork urged the President and the Congress to provide explicit "authority to certify state and local governments' compliance with the [generally applicable policy] to administrators of federal assistance programs."[220] In addition, the National Governors' Association in 1981 reaffirmed its strong support for this approach,[221] and the National League of Cities has favored using certification as the means by which cities would comply with federal age discrimination and equal employment opportunities requirements.[233]

Two pieces of legislation seriously considered by the U.S. Senate during the 97th Congress incorporated the certification approach. Both were reported out favorably by the full Committee on Governmental Affairs and one passed the Senate, but neither was enacted.

The one that passed the Senate was the "Regulatory Reform Act" (S 1080). Section 625 of that bill would have explicitly authorized federal agency heads to certify which state and local requirements are equivalent to federal ones and to accept their use in lieu of the federal requirements. This provision of the proposed legislation was designed specifically to address the problem of unnecessary regulatory burdens and duplication.

The other bill was the "Federal Aid Improvement Act" (S 807). Title III of that proposal would have implemented ACIR's recommendation on standardizing and simplifying generally applicable federal grant requirements, including authority for the heads of federal agencies to accept the substitution of state and local laws and regulations in place of related federal ones.

Despite these endorsements, the concept of "certification" has not yet been very fully developed. It means different things to different people. There are at least three different views of this concept—acceptance, assurance and waiver. Each is explored briefly below.

"Certification acceptance" is the original form of the concept, and there are several existing examples of it. Section 116 of the *Federal-Aid Highway Act of 1973* (23 U.S.C. 117) is one of the clearest. It reads in part as follows:

> 117. *Certification Acceptance*
>
> (a) The Secretary may discharge any of his responsibilities under this title relative to projects on Federal-aid systems, except the Interstate System, upon the request of any State, by accepting a certification by the State highway department, or that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction, of its performance of such responsibilities, if he finds such projects will be carried out in accordance with State laws, regulations, directives, and standards establishing requirements at least equivalent to those contained in, or issued pursuant to, this title.

Other examples of this approach exist in the fields of equal employment opportunity and fair housing. The U.S. Equal Employment Opportunities Commission has reviewed the EEO requirements of state and local governments and certified those which were equivalent to, or exceeded the federal ones. Jurisdiction over cases in those states and localities was transferred to the appropriate state or local government. The U.S. Department of Housing and Urban Development has followed a similar procedure with its fair housing cases.

A similar certification procedure also is the keystone for partial preemptions. In these cases, federal regulators assess the adequacy of state and local laws and regulations in relation to the relevant federal partial preemption legislation, and authorize the substitution of state or local regulation for a federal counterpart where such an action would result in equivalent or higher regulatory performance. The certification provisions in the proposed "Regulatory Reform Act" and the "Federal Aid Improvement Act," as reported out by the Senate Governmental Affairs Committee during the 97th Congress, also followed this "certification acceptance" format.

A question has been raised concerning whether a federal decision to accept each particular set of state and local laws and regulations in lieu of specified federal ones constitutes federal "rulemaking" subject to all the federal requirements for notification, review and comment, and hearings. In addition, a change in the certified state or local laws or regulations is considered by some observers to be equivalent to new federal rulemaking. If this reasoning is followed, certification could become quite cumbersome or the substitution of one set of rules for another might be subject to challenge for lacking "due process." The law should give clear guidance on this point, and legal remedies should be available to aggrieved parties if the rulemaking route is not followed.

The extent to which federal agencies actually make prior evaluations of equivalency before accepting certifications is open to question. In grant programs, the pressure to get the money out tends to short-cut the "prior findings" process and to encourage reliance on the post audit to enforce compliance. Nevertheless, the "certification acceptance" approach establishes federal compliance standards before grants are approved so they will be known by grantees ahead of time. If the substituted state and local provisions must be "substantially equivalent" to the federal ones, greater certainty but little flexibility may result. If the looser criterion is applied—state and local substituted provisions need only be "reasonably related" to the purposes and goals fo the federal regulations—the standard would provide less certainty about how it should be applied but would leave more room for state and local flexibility.

The "reasonably related" formulation of federal standards moves in the direction of the state and local discretion but is not as open-ended as self-certification; it would entail a substantial monitoring effort by the federal agencies. The "substantially equivalent" version—the one usually applied—can lead to very inflexible administration of the certification process, and often requires changes in state or local laws and regulations before certification can be acquired.

"Self certification" is a new form of certification ushered in largely by the enactment of nine new block grants for FY 1982. In this form, the grant recipients certify a variety of *assurances* to the relevant federal departments that the new grants will be administered consistent with the provisions of any applicable federal laws.* Executive branch regulations are minimal, and the federal executive branch makes no findings about the grant recipients' capabilities or the adequacy of state or local laws, regulations and other requirements in relation to the related federal ones. The key to compliance lies in performance reporting and follow-up by the recipient's own level of government.

Under these new block grants, audits are provided by the recipients themselves, and a performance report must be prepared and published at the end of each year. Compliance with "applicable federal law" is required, but interpretive federal regulations are not inserted between the provisions of federal law and interpretations by the states and localities concerning what standards may be used to demonstrate compliance. Thus, instead of a single federal interpretation, there is a potential for many different state and local standards. In fact, the federal laws generally are broad enough to allow and invite a wide array of interpretations.

Acting through the regular political and judicial processes within the state, state and local governments are responsible for their performance under the block grants to their own citizens, voters and program clientele. Federal audits may be performed, but currently they are contemplated only in cases where nonperformance or malfeasance has been alleged by aggrieved parties. It can be expected that differing state and local interpretations of what constitutes compliance with applicable federal law may spawn many more law suits in both state and federal courts than would a single set of federal regulations. The fear of some is that, in effect, the courts, over a period of years, may end up writing a single set of federal regulations themselves. This process could be long, drawn out, confusing, costly and could negate the original intent of enhancing situational flexibiltiy through self-certification.

"Certification waiver" has been proposed to relieve excessive burdens of federal rules and regulations on small units of government incapable of responding in the normal way because of their small size and lower capacities to handle complex administrative burdens. This approach was embodied in the *Regulatory Flexibility Act* (PL 96-354) which became effective January 1, 1981. Section 603 of that act explicitly allows small entities to use different compliance standards or exempts them from coverage.

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*In some cases certification of eligibility for federal grants relies upon action by more than a single state and/or local government. Interstate entities are an obvious case. Metropolitan planning organizations (MPO's) for urban transportation planning are another. In the case of the MPO's, state designation with local concurrence provides the ability to comply with federal requirements.

On balance, the Commission favors the self-certification strategy as providing state and local governments with the greatest flexibility in complying with national requirements. The Commission believes that the greater use of this strategy should be encouraged by enacting legislation authorizing and encouraging federal agency heads to consider using self-certification procedures. This recommendation broadens the Commission's previous position, which favored using certification only for generally applicable (or crosscutting) requirements, to include a more extensive array of regulations. At the same time, the Commission believes that self-certification procedures should contain provisions for federal review of state and local compliance experience so that any significant departures from federal objectives can be remedied.

In making this recommendation, the Commission confronted and resolved three basic issues:

1. What standards are to be applied, and are they to be applied uniformly to all classes of affected state and local governments?
2. Who should be charged with making the certification and should this be the same in all cases?
3. Who is responsible for auditing compliance and withdrawing ineffective certifications?

The basic choice between certification by a federal agency and certification by state and local governments themselves was resolved in favor of the state and local governments. This position means that there would be no federal standard applied to submissions by the state and local governments showing how compliance with the federal standards would be accomplished. Hence, state and local governments would not submit evidence concerning how compliance will be ensured and the federal government would make no judgments.

There is no experience to report yet under the new block grants, because the first year compliance audits were not completed at the time of this writing. It is uncertain how much initiative the federal agencies will take with respect to compliance audits. Federal agencies may take different stances on this from time to time, unless the courts or Congress—as with the new Community Development Block Grant— lay down clearer guidelines than those in current legislation. Some observers worry that the present legislation and administrative regulations for these block grants are so vague as to be ripe for drawn out litigation that could leave the states and localities in a serious position of uncertainty concerning their ability to administer these programs.

For any federal agency certification processes that may remain in effect, different federal compliance standards may be set for different sizes and capabilities of governments in accordance with the *Regulatory Flexibility Act.* This authorization would be extended to grant and loan rulemaking, in addition to regulatory rulemaking, if the *Administrative Procedure Act* is amended in accordance with *Recommendation C. 2* above. Under the Commission's "self-certification" recommendation, however, this differentiation would be made in effect by state and local governments, unless overridden by Congress, the courts or by federal post-audit standards.

The Commission's recommendation includes a provision for compliance audits and possible withdrawal of state and local certifications. The federal government is the audit agent named. Although this provision appears, on the surface, to be essentially the same as that in existing federal agency "certification acceptance" procedures, it would operate very differently in practice. Under the federally dominated practice, audits would be expected to be federal ones, and the federal agencies would be expected to take a substantial interest in initiating them in some systematic fashion. However, under the Commission's recommendations, most audits would be performed at the state and local levels, with federal audits usually being conducted only when some question arises.

Recommendation C. 5

Toward Greater Flexibility: The Use of Alternative Means in Regulating State and Local Governments

The Commission concludes that, when the federal government regulates state and local governments, unnecessary burdens have arisen from an over reliance upon traditional, rigid and increasingly intrusive means of regulation. The Commission finds that a range of alternative means of regulation exists that provides opportunities to increase flexibility and reduce the burdens of intergovernmental regulation. Indeed, some of those alternative means may enhance the achievement of national goals while reducing direct involvement by the federal government. Therefore,

The Commission recommends that the President, executive agencies, and independent regulatory commissions fully consider alternative means of regulation when making rules to implement legislation calling for federal regulation of state and local governments and that they seek to provide maximum flexibility to state and local governments consistent with national objectives and provisions of federal law. In cases where prescriptive federal law prohibits the flexible use of alternative means for achieving regulatory objectives, the Commission recommends that the President and Congress consider amending such legislation to allow the use of alternatives. Among the alternative regulatory means considered should be performance standards, special provisions for small governments, marketable rights, economic incentives and compliance reforms.

Although federal regulators have not always relied on highly prescriptive, closely monitored approaches to regulation, they generally have chosen this course. These forms of regulation often have had high price tags, have been hard to implement, have required a great deal of federal effort, and have been largely ineffective. State and local officials generally express more concern about the "means" of federal regulation than about the basic goals or ends.

To cite one recent case, the City of Skagway, AK, was pushed by the U.S. Environmental Protection Agency into building a very expensive waste water treatment plant during the 1970s even though it was not needed under the circumstances. "EPA imposed on tiny isolated Skagway, whose minimal domestic sewage discharge simply disappeared in the water volume and flows of the Pacific Ocean, the same treatment standards developed for massive toxic-waste discharges by major population and industrial centers into freshwater lakes and rivers."[223] And, even though EPA approved its design, the plant could not achieve EPA standards under the climatic and physical conditions of the Skagway site. The case went to court and produced a great deal of acrimony on all sides. An analysis of alternatives might well have led to a different approach that would have allowed some flexibility in adapting to local circumstances.

Supporting this view, the General Accounting Office issued a report in 1980 urging the EPA to help small communities cope with federal pollution control requirements. GAO found that:

> Small communities—under 10,000 population—are generally subject to the same environmental quality regulations as larger ones. Complying with these regulations exacts a much higher economic and social price from small communities, however, because the cost of constructing environmental control projects must be shared by fewer taxpayers, sometimes placing severe burdens on low-income residents. Also, small communities lack technical expertise needed to plan complex environmental projects.
>
> The Environmental Protection Agency should minimize small communities' problems by
>
> - more carefully reviewing new sewer system justifications,
> - providing additional technical assistance to small communities, and
> - experimenting with comprehensive approaches to pollution control.[224]

In another recent report, GAO also concluded that "A market approach to air pollution control could reduce compliance costs without jeopardizing clean air goals."[225] Market incentives involving the purchase, sale and use of air pollution entitlements were suggested. Congress was urged to encourage EPA to use this approach wherever permissible under the present *Clean Air Act* and to amend the act to remove existing limitations on this practice. Specifically, GAO suggested that Congress allow substituting controlled trading in emission rights for the rigid requirements of new source performance standards (Section 111), lowest achieveable emissions rate technology (Section 165), and best available control technology (Section 173) and that Congress consider replacing case-by-case determinations of compliance with emissions and technologies standards, using periodic determinations instead.[226]

The need for greater flexibility and for using alternative approaches to attain regulatory goals has not gone unnoticed. The past two administrations and the Congress have begun to move in this direction, as *Chapter VI* of this study indicates. Under Presidents Carter and Reagan, increasing attention has been focused upon the use of alternative means of implementing regulations during the administrative rulemaking process. In addition, regulatory standards themselves (and deadlines for meeting them) have been revised from time to time as implementation realities have become more evident.

Some of the innovative techniques successfully applied under the Carter Administration were:

- tailoring regulatory requirements to fit the size or nature of the regulated entity in social services and hazardous waste programs;
- using performance standards and cost-effectiveness measures in meeting requirements under the OSHA, mass transit, equal employment opportunity, water pollution and air pollution programs;
- using self-compliance methods under which labor-management committees help monitor safety and health requirements under OSHA, resident councils do the same in nursing homes, and private auditors (hired by environmental polluters) audit polluters' compliance with federal air and water quality standards; and
- using increased fines for air pollution violators sufficient to offset any cost savings that might be attained from noncompliance.[227]

In the first year and a half of the Reagan Administration's regulatory relief efforts, accomplishments reported in using alternative means in the state-local sector included:

- reconsidering the strategies for providing education to non-English speaking students;
- targeting occupational safety and health inspections to those work places having above-average injury rates and complaints;
- simplifying the certification of food stamp eligibility;
- providing greater flexibility in meeting requirements for surface mining restoration, for paying prevailing wages on government-sponsored construction, and for transportation access by the handicapped;
- using compliance certifications to meet a wide range of federal requirements under the nine new block grants, and[228]
- permitting firms to transfer allowable air pollution emissions from one site to another.[229]

Through experience with such alternative approaches to federal regulation under the Carter Administration (EO 12044) and the Reagan Administration (EO 12291), five general types have begun to show promise of enhancing flexibility for state and local governments. Each of these is described briefly below.

1. Performance standards regulate according to general performance criteria or goals rather than by detailed specification of the means of compliance. Performance standards potentially permit greater freedom of action by regulated entities and reduced compliance costs. They also provide more freedom to discover and use new, more efficient and more effective compliance technologies. In addition, performance standards may be especially beneficial in regulating state and local governments because they facilitate tailoring the means of regulation to fit current state and local law and individual organizational structures. Performance standards, however, are no panacea. Their indiscriminate use ultimately could prove more burdensome to state and local governments than the more familiar command-and-control techniques if the choice of performance measures is inappropriate.

2. Tailoring regulatory requirements to fit the small size or unusual nature of certain regulated entities (tiering) usually is a matter of simplifying and reducing unnecessary regulatory burdens associated with federal recordkeeping and reporting requirments. However, such tailoring also may result in scaled back standards and modified compliance mechanisms to match the capabilities of small governments.

3. The use of marketable rights is an innovative way to allocate scarce resources. Traditionally, governments decide, case by case, who is permitted to undertake particular activities and who is not. With the market approach, rights to conduct these limited activities are created and these rights then may be traded or sold among bidders. This approach removes the government from difficult and contentious decisions about who can "best" use the limited resource. Instead, the market allocates rights according to which users can derive the most value from their use, as measured by their willingness to pay.

4. Economic incentives may be established in regulatory programs where the private sector fails to satisfy public expectations. In many of these cases, market failure resulted because private sector costs did not accurately reflect the costs to society. Pollution is the best known example of this kind of market failure. An air polluter incurs no direct cost from its emissions, yet downwind communities must pay for the resulting health and material damage. In such cases, technically referred to as negative externalities, the traditional regulatory response attempts to eliminate or directly to restrict the unwanted activity and assesses fines against violators. In contrast, an incentives approach seeks to correct the problem by proper pricing. Price corrections are the most common form of economic incentives and are generally applied through fees or subsidies. Economic incentives can encourage improvement beyond a particular standard and at a faster pace. Of particular significance to states—which are often co-regulators of air and water pollution standards—pricing requires less continuous government involvement, thereby reducing state and local administrative costs.

5. Compliance reforms involve market-oriented procedures to replace or supplement strict governmental monitoring and enforcement activities. They include both "third party monitoring" and "penalties that reflect the degree of noncompliance." The compliance reform that is most significant for intergovernmental regulation is the substitution of state or local regulatory programs for federal ones (see *Recommendaton C. 4* above). This substitution occurs by certifying state or local regulations. Certification can be approached in a number of ways. In some cases, federal regulators assess the adequacy of state and local laws and regulations in relation to federal laws and regulations, and then authorize the substitution of state or local ones where such action would result in equivalent or higher performance. A far more flexible approach now is being used, however, for the nine recently enacted block grant programs in health, education, social services and community development. Although there are some differences among these programs, the basic thrust for all is that the state and local governments themselves certify that federal regulatory intentions will be achieved, and proof of compliance is supplied through performance reporting and follow-up action undertaken largely by the regulated entitity intself. Of course, noncomliance with applicable provisions of federal law remains a basis for federal intervention if the need arises.

Based in part upon executive branch experiences in trying these alternative means of regulation, Congress also has begun to call for greater regulatory flexibility. The *Regulatory Flexibility Act*, enacted in 1980, marks the beginning of Congressional support for using these techniques. The act—which became effective January 1, 1981—provides a statutory basis for expanded efforts to make federal regulations more flexible and less burdensome for small entities. It charges federal regulators (including both executive branch agencies and independent regulatory commissions) with anticipating and reducing the impact of regulations and paperwork on governments with populations under 50,000, as well as on small businesses and other small organizations. It sets standards of federal regulatory behavior that, if adhered to, could reduce regulatory burdens on small cities, counties, towns, townships, villages, school districts and special districts—a list that encompasses well over 40,000 small local governments.

Under the act, it becomes an express duty of all regulators to consider alternative regulatory forms that will better reflect the compliance capacities of small entities. Executive branch and independent federal regulators also are required to notify small entities of proposed regulations that will affect them and to achieve the participation of such entities in developing and considering regulatory alternatives. The act lists specific procedures for agencies to use in achieving this participation, including advance notice that a rule may affect small entities; placing the notice in the publications of small entities or their organizations; direct notice to affected parties; conferences or public hearings; and modification of agency procedures for obtaining input from small entities. Finally, in recognition that small businesses do not have a strong advocacy organization to look after their interests, the act designated a single federal officer, the chief counsel for advocacy in the Small Business Administration, to monitor governmentwide performance in regulating small entities.

To meet these requirements agencies were directed to publish, beginning in April 1981, and in every October and April thereafter, a regulatory flexibility agenda composed of a list of rules for which the agency anticipates publishing a Notice of Proposed Rulemaking in the *Federal Register.*[230] Rules to be included are those likely to have significant economic impact on a substantial number of small entities. Moreover, for each such rule for which a notice eventually is published, an agency must prepare and make available for public comment an "Initial Regulatory Flexibility Analysis" that is published in the *Federal Register* with the notice. Initial flexibility analyses must contain:

- a rationale for the agency's action;
- the objectives of the proposed rule and the legal basis for it;
- an estimate of the type and number of small entities it will affect;
- a detailed estimate and description of the reporting, recordkeeping and compliance requirements anticipated;
- an identification of relevant Federal rules that may conflict with, duplicate or overlap the proposed rule; and
- a specific discussion of alternatives to the rule that could accomplish the same objectives, such as different standards for large and small entities (multitiering), performance standards, or exemption of small entities.

When an agency promulgates a final rule, it now also must publish a final regulatory flexibility analysis. This final statement is to focus on how the agency handled issues raised during the initial analysis as well as the agency's responses to public comments received as a result of publishing the initial analysis.

The act also addresses problems stemming from the current body of existing regulations affecting small entities by requiring agencies, within ten years, to examine systematically their existing and outstanding rules with respect to small entities. Agencies are to consider the continued need for the rule, public complaints regarding it, its complexity, and the extent to which it conflicts with or duplicates other regulations—both federal and state.

Agencies are allowed some flexibility in complying. Initial analyses may be waived or delayed in an emergency. In addition, when agencies certify that a proposed rule will not have significant economic impact on a substantial number of small entities and file such a certification with SBA's chief counsel for advocacy, they need not prepare flexibility analyses.

A year after the *Regulatory Flexibility Act* became effective, both the House and Senate Subcommittees on Small Business held hearings on its implementation. All indications were that the act had produced little relief for small governments.[231] The lack of interest shown by federal agencies in applying this act to small governments was abetted by the fact that small governments were not even included in the bill until subcommittee mark-up, and there was little debate on this point. The act was passed primarily to benefit small businesses and the implementing office in the Small Business Administration has had little if any experience with small governments. Not surprisingly, SBA has not acted aggressively on behalf of small governments. This lack of SBA action places the burden on these governments and their associations to make use of the public comment provisions of the law to urge SBA's general counsel for advocacy to intercede with federal agencies on their behalf.

In addition to these obstacles, the emphasis within the law on economic effects works against agency consideration of effects on small governments because many of the effects are not primarily financial. Because nonquantifiable effects do not fall under the commonly held, but overly simple, definition of economic impact, they may not be recognized when federal agencies identify potential impacts on small entities.

A second Congressional effort to increase regulatory flexibility was embodied in the proposed "Regulatory Reform Act," (S 1080). The Senate passed this bill in March 1982, but the 97th Congress adjourned without House action. Similar to the *Regulatory Flexibility Act*, the Senate's regulatory reform bill would have established required procedures and deadlines for reviewing of regulations in the executive branch and in independent regulatory commissions, created a regulatory agenda and calendar, and authorized substituting state and local regulations for federal ones upon a federal finding that the state and local regulations are at least equivalent. The Senate committee report on this bill stated that "this legislation is intended ... to assure that future major rules are cost-effective and include a review of alternative approaches to regulatory action...."[232] Notices of proposed rulemaking under this bill would have to solicit proposals from the public and from the state and local governments concerning less burdensome alternative regulatory techniques.[233]

If passed, the "Regulatory Reform Act" would have applied to regulations affecting all "entities," not just to small ones as is the case with the *Regulatory Flexibility Act*. It would have further institutionalized the process now being used in the executive branch to require an analysis of alternative means of achieving regulatory goals, though the bill was not as explicit on this point as the *Regulatory Flexibility Act*. Such institutionalization would require systematic regulatory reviews regardless of changing views by future Presidents about the need for them. Yet the bill would not have taken a strict cost-benefit approach or applied in mandatory fashion to any but "major" rules—recognizing methodological difficulties and the potential overburdening of the federal agencies that would have to comply.

To summarize the present situation, federal regulation of state and local governments has created many unnecessary burdens and rigidities that are both costly and unfair to states and localities. Alternative means of achieving national regulatory objectives are available that promise greater flexibility and cost-effectiveness. A substantial amount of experience in applying these alternatives to the state-local sector is being amassed. The appropriateness of this approach is being recognized by both the President (by executive order) and Congress (through enactment of the *Regulatory Flexibility Act* and consideration of the "Regulatory Reform Act").

But obstacles to using alternative regulatory approaches remain. Legislation sometimes is too restrictive to allow innovation. At other times, it is the administrative rulemaking that has created excessive rigidities. Benefit-cost analysis is not always an adequate or appropriate methodology to guide the choices among alternatives. At present, there is no statutory requirement to consider alternative means of achieving national regulatory objectives that could allow substantial flexibility for state and local governments—other than the *Regulatory Flexibility Act*, which applies only to small communities.

In this recommendation, the Commission urges all parties at the federal level—the executive branch, Congress and the independent regulatory commissions—to be sensitive to the needs of state and local governments for flexibility in complying with federal regulations, and to take positive action to provide such flexibility.

FOOTNOTES

[1] See *Chapter 1, Appendix Table 1A.*

[2] Lewis Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," *Columbia Law Review* 79 (1979), p. 870.

[3] President's Commission for a National Agenda for the Eighties, *Government and the Regulation of Corporate and Individual Decisions in the Eighties* (Washington, DC: U.S. Government Printing Office, 1980), p. 35.

[4] The Commission on Intergovernmental Relations, *Report to the President for Transmittal to Congress* (Washington, DC: U.S. Government Printing Office, 1955), p. 64.

[5] *Ibid.*, p. 70.

[6] *Ibid.*, p. 66.

[7] See, for example, President Ronald Reagan, "An Era of American Renewal: The President's Report to Congress on the State of the Union," *Weekly Compilation of Presidential Documents*, 18 (February 1, 1982), p. 81.

[8] See, for example, the *Equal Pay Act of 1963*, the *Civil Rights Act of 1964*, the *Age Discrimination in Employment Act of 1968*, Title IX of the *Education Amendments of 1972*, the *Rehabilitation Act of 1973*, and the *Age Discrimination Act of 1975*.

[9] U.S. Congress, House, *Omnibus Budget and Reconciliation Act of 1981, Conference Report to accompany HR 3982*, H. Rept. 97–208, 97th Cong., 1st sess., 1981, pp. 38, 171, 198–99, 209, 216–17, 498–99, 548, 580.

[10] See Alan H. Magazine, *Environmental Management in Local Government* (New York: Praeger Publishers, 1977), p. 96; and U.S. General Accounting Office, *Federal-State Environmental Programs—The State Perspective* (Washington, DC: U.S. Government Printing Office, 1980), p. ii.

[11] *National League of Cities v. Usery*, 426 U.S. 851 (1976). However, the Supreme Court has not overruled any partial preemptions on this basis. See especially *Hodel v. Virginia Mining and Reclamation Association*, 49 L.W. 4654 (June 15, 1981).

[12] U.S. Congress, Senate, Committee on Governmental Affairs, *Framework for Regulation*, Vol. VI, *Study on Federal Regulation*, Committee Print, 95th Cong., 2d sess. (1978), p. 16.

[13] "Conference Session Needed to Iron Out Differences on Noise Control Measure," *Congressional Quarterly Weekly Reports*, December 26, 1981, p. 2593.

[14] Commission on Intergovernmental Relations, *Report to the President*, p. 60.

[15] Committee on Governmental Affairs, *Framework for Regulation*, p. xi.

[16] See Magazine, *Environmental Management*, p. 93.

[17] National League of Cities, "Municipal and Program Survey," unpublished tabulation (Washington, DC: National League of Cities, 1981), pp. 7, 8.

[18] *Ibid.*, p. 7.

[19] National Association of Counties, "The Effects of Crosscutting Requirements on County Governments," memorandum (Washington, DC: National Association of Counties, February 19, 1981), p. 2.

[20] Ernest Holsendolph, "Court Sets Aside Rule for Transit to Adapt to Serve Handicapped," *New York Times*, May 26, 1981, p. A19.

[21] 46 *Federal Register* No. 138, July 20, 1981, pp. 37488–94.

[22] U.S. Department of Education, Office of Planning and Budget, "Effectiveness of Bilingual Education: A Review of the Literature," xeroxed (Washington, DC: Department of Education, 1981).

[23] In 1981, the Education Department suspended implementation of proposed final regulations for bilingual education. However, more flexible regulations have not yet been substituted for the troublesome, preexisting interim regulations.

[24] See, for example, Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in *Government Regulation: Achieving Social and Economic Balance*, Vol. 5 of *Special Study on Economic Change*, U.S. Congress, Joint Economic Committee (Washington, DC: U.S. Government Printing office, 1980), pp. 326–77.

[25] Additional costs are those costs attributable solely to federal regulation, above and beyond that level of expenditure that a state or local government spent on an activity prior to the imposition of the regulation.

[26] See, for example, *Nation's Cities Weekly*, December 21, 1981; and Edward Koch, "The Mandate Millstone," *The Public Interest* (Fall 1980), p. 97.

[27] Joseph Califano, *Governing America* (New York: Simon and Schuster, 1981), p. 314.

[28] See S 83, "To amend the *Congressional Budget Act of 1974* to limit the level of total budget outlays in any fiscal year and to require compensation for additional costs imposed on state and local governments, and for other purposes," 97th Cong., 1st sess., 1977, section 313.

[29] "Funding National Water Pollution Control Programs," *Water Pollution Control Federation Journal* 53 (April 1981), p. 431.

[30] Richard Cappalli, "Mandates Attached to Federal Grants: Sweet and Sour Federalism," *Urban Lawyer* 13 (Spring 1981), p. 151.

[31] For an illustration of such difficulties, see Catherine Lovell, et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside, CA: University of California, 1979), pp. 114–48.

[32] Congressional Budget Office, "The Feasibility of Preparing State and Local Cost Estimates: A Report to the House Rules Committee" (Washington, DC: Congressional Budget Office, 1981), p. 16.

[33] ACIR, *The States and Distressed Communities: The 1982 Report* (Washington, DC: U.S. Government Printing Office, forthcoming).

[34] Legislative Analyst, State of California, *State Reimbursement of Mandated Local Costs: A Review of the Implementation of Chapter 1135, Statutes of 1977* (Sacramento, CA: Legislative Analyst, State of California, 1980), pp. 2–9.

[35] *Ibid.*, p. 2.

[36] Cited in testimony of Dr. John Hernandez, deputy administrator, U.S. Environmental Protection Agency, in U.S. Congress, House, Committee on Public Works and Transportation, *The Need for Legislative Changes in the Construction Grants Program of the Federal Water Pollution Control Act, Hearings before the Subcommittee on Water Resources*, 97th Cong., 1st sess., 1981, pp. 40, 43.

[37] *Ibid.*, p. 29.

[38] Erwin Levine and Elizabeth Wexler, *PL 94–142: An Act of Congress* (New York: MacMillan Co., 1981), pp. 188, 189.

[39] Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches* (Washington, DC: U.S. Government Printing Office, 1979), p. xi.

[40] U.S. General Accounting Office, *States' Compliance Lacking in Meeting Safe Drinking Water Regulations*, CED-82-43 (Washington, DC: U.S. Government Printing Office, 1982), p. 8; see also National Governors' Association, *Policy Positions 1981–82* (Washington, DC: National Governors' Association, 1981), p. 114; National Association of Counties, *American County Platform and Resolutions, 1981–1982* (Washington, DC: National Association of Counties, 1981), p. 78.

[41] See U.S. General Accounting Office, *Obstacles to Billboard Removal* (Washington, DC: U.S. Government Printing Office, 1978), p. 15; and U.S. General Accounting Office, *Hazardous Waste Management Programs Will Not Be Effective* (Washington, DC: U.S. Government Printing Office, 1979), p. i.

[42] Ernest Boyer, quoted in Edward Fiske, "Congress-Carter Clash Involves Philosophic and Political Issues," *New York Times*, February 15, 1978, p. A-31.

[43] Quoted in Rochelle Stanfield, "Bringing the World to the Disabled—The Feds Start to Get Tough," *National Journal*, February 18, 1978, p. 273.

[44] See, for example, Office of Management and Budget, "The First 100 Days of EO 12291, 'Federal Regulation,'" processed (Washington, DC: Office of Management and Budget, June 13, 1981), p. 1.

[45] The bulk of direct orders to states and local governments come from the federal judiciary and are Constitutionally grounded in the 14th Amendment.

[46] *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).

[47] U.S. Congress, Senate, *The Constitution of the United States of America: Analysis and Interpretation*, Document No. 39, prepared by the Legislative Reference Service, Library of Congress, 88th Cong., 1st Sess. (Washington, DC: U.S. Government Printing Office, 1964), p. 1036.

[48] *National League of Cities v. Usery*, 426 U.S. 833 (1976).

[49] For a further discussion fo the *Fair Labor Standards Act* and its continuing, if modified, application to certain state and local employees, see *Recommendation B.3.*

[50] The Court admitted that Congress might be able to achieve similar results through the 14th Amendment or the spending power. In his concurrence, Justice Blackmun interpreted the Court's holding as adopting "a balancing approach, [which] does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."

[51] 426 U.S. 833 at 854.

[52] *Ibid.*, p. 845.

[53] *Ibid.*, p. 852.

[54] See *United States Transportation Union v. Long Island Rail Road Co.*, U.S. Sp. Ct., Docket No. 80-1925 (March 24, 1982) in which the Court ruled that the operation of a railroad "is clearly not a [n] integral part of traditional state activities generally immune from federal regulation." Slip Opinion, II.

[55] 262 U.S. 447 (1923).

[56] *Ibid.*

[57] *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947). See also, *U.S. v. Butler*, 297 U.S. 1 (1936).

[58] "The Federal Conditional Spending Power: A Search for Limits," *Northwestern University Law Review* 70 (May–June 1975), p. 309.

[59] *Steward Machine Company v. Davis*, 301 U.S. 548 at 590 (1937).

[60] A.E. Dick Howard, "Judicial Federalism: The States and the Supreme Court," in *American Federalism: A New Partnership for the Republic*, Robert B. Hawkins, Jr., ed. (San Francisco: Institute for Contemporary Studies, 1982), p. 220.

[61] Thomas J. Madden, "The Law of Federal Grants" in Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M-122 (Washington, DC: U.S. Government Printing Office, 1980), p. 16.

[62] *North Carolina v. Califano*, 445 F. Supp. 532 at 535 (E.D. N.C. 1977), *aff'd* 435 U.S. 962, 98 S. Ct. 1597 (1978).

[63] *Ibid.*

[64] See for example: *Highway Beautification Act of 1965* (23 U.S.C. 131), *National Health Planning and Resource Development Act of 1974* (42 U.S.C. 300m(d), *Federal Aid Highway Amendments of 1974* (23 U.S.C. 154), *Education of All Handicapped Children Act of 1975* (20 U.S.C. 1416), and *Clean Air Act Amendments of 1977* (42 U.S.C. 7506(c) and 7616).

[65] Lewis B. Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," *Columbia Law Review* 79 (1979), pp. 881–883.

[66] *Montgomery County v. Califano*, 449 F. Supp. 1230 at 1247 (D. Md. 1978).

[67] Richard B. Cappalli, *Rights and Remedies Under Federal Grants* (Washington, DC: Bureau of National Affairs, Inc., 1979), pp. 177–8.

[68] PL 91-373, 84 Stat. 697.

[69] PL 94-566, 90 Stat. 2667.

[70] Charles S. Rhyne, et al., *Federal Grant Conditions*, 1979 Seminar Workpaper prepared for the 1979 NIMLO Mid-year Seminar, Washington, DC, March 25–27, 1979, p. 93.

[71] Estimates ranged from $385 million to over $1 billion annually for several years. *Ibid.*, p. 95.

[72] *Hodel v. Virginia Surface Mining and Reclamation Association*, 49 LW 4654 at 4660 (1981). (Emphasis in original.)

[73] *Ibid.*, p. 4460.

[74] See for example *District of Columbia v. Train*, 521 F. 2d 971, 988 (D.C. Cir. 1975), vacated on other grounds, 431 U.S. 99 (1977). Moreover, there appears in such cases to be an implicit tendency to bow to the "Blackmun balancing approach."

[75] *Duquesne Light Company v. EPA*, 481 F. 2d. 1 (3d Cir. 1973), 522 F. 2d 1186 (3d Cir. 1975), vacated and remanded on other grounds, 427 U.S. 902 (1976).

[76] Kaden, "Politics, Money, and State Sovereignty," pp. 858, 870.

[77] *Los Angeles County v. Marshall*, 631 F. 2d 767 (D.C. Cir.), *cert. denied*, 101 S. Ct. 113 (1980).

[78] A.E. Dick Howard, Speech before the Federalism Conference sponsored by the Institute for Contemporary Studies, Washington, DC, September 9, 1981.

[79] *Pennhurst State School and Hospital v. Haldeman*, 49 LW 4363 at 4367 (April 29, 1981).

[80] George D. Brown, "Grant Law and Grant Reform: The Role of the Courts in Federal Financial Assistance Programs," *Intergovernmental Perspective* 7 (Fall 1981), p. 8.

[81] 49 LW 4363 at 4369.

[82] Brown, "Grant Law and Grant Reform," p. 8.

[83] 49 LW 4363 at 4367, no. 13.

[84] Brown, "Grant Law and Grant Reform," p. 8.

[85] 440 U.S. 942 (1979).

[86] See Alan B. Morrison, "N-w Fed-ral-sm Holes," *New York Times*, September 20, 1982, p. A-15; *United Transportation Union v. Long Island Rail Road Co., et*

al., 80–1925 opinion; and *Education Times*, September 20, 1982, p. 5.

[87] See Stuart Taylor, Jr., "U.S. To Support States In Regulating Abortions," *New York Times*, July 29, 1982, p. A-17.

[88] Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism: Restoring Confidence and Competence*, A-86 (Washington, DC: U.S. Government Printing Office, 1981), p. 144.

[89] *Ibid.*, pp. 147–8.

[90] See Stewart A. Baker and James R. Asperger, "Foreword: Toward A Center for State and Local Legal Advocacy," *Catholic University Law Review* 31 (1982), p. 372; and Stewart A. Baker and James R. Asperger, "Afterword: More About the Center," *Catholic Law Review* 31 (1979), p. 505.

[91] *Ibid.*

[92] See Stewart A. Baker, "Progress to date on the State and Local Legal Center," memorandum dated September 30, 1982.

[93] See Erwin Levine and Elizabeth Wexler, *PL 94–142: An Act of Congress* (New York: Macmillan Publishing Co., 1981), pp. 93–103.

[94] Lewis Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," *Columbia Law Review* 79 (1979), p. 874.

[95] Thomas Madden, "The Law of Federal Grants," in ACIR, *Awakening The Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M-122 (Washington, DC: U.S. Government Printing Office, 1980), pp. 17, 18.

[96] "The Federal Conditional Spending Power: A Search for Limits," *Northwestern University Law Review* 70 (May–June, 1975), p. 317.

[97] *Massachusetts v. Mellon*, 262 U.S. 447 (1923) and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[98] Kaden, "Politics, Money, and State Sovereignty," p. 894.

[99] *Pennhurst State School and Hospital v. Halderman*, 49 L.W. 4262 at 4369 (April 29, 1981).

[100] See *Chapter 2* of this volume, "The Legal Foundations of Regulatory Federalism: Constitutional and Judicial Perspectives," for more discussion of this point.

[101] Ironically, if one uses the amounts of federal funds that Congress allocates to different programs as an indicator of its priorities, then the smaller average size of programs which include crossover sanctions suggests they often may be deemed less significant than many programs which are subject to the penalty.

[102] Richard B. Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," *Yale Law Journal* 86 (1977), p. 1262.

[103] U.S. General Accounting Office, *Speed Limit 55: Is It Achievable?* (Washington, DC: U.S. Government Printing Office, 1977), p. ii.

[104] *Vermont v. Brinegar*, 379 F. Supp. 617 (1974).

[105] 445 F. Supp. 532 (1977).

[106] 449 F. Supp. 1230 (1978).

[107] *Ibid.*, at 1247.

[108] Joseph F. Zimmerman, "Frustrating National Policy: Partial Federal Preemption," in *The Nationalization of State Government*, ed. Jerome J. Hanus (Lexington, MA; D.C. Heath and Company, 1981), p. 87.

[109] Arthur W. Macmahon, *Administering Federalism in a Democracy* (New York: Oxford University Press, 1972), p. 56.

[110] *The Clean Air Act* (42 U.S.C. 1857 et seq.). Section 101 (a).

[111] 49 LW 4660 (June 16, 1981).

[112] James E. Krier and Edmund Ursin, *Pollution and Policy* (Berkeley, CA: University of California Press, 1977), p. 340.

[113] U.S. General Accounting Office, *Federal-State Environmental Programs—The State Perspective* (Washington, DC: U.S. Government Printing Office, 1980), p. 81.

[114] National Governors' Association, *Eliminating Roadblocks to Efficient State Government: The Governors' Green Book* (Washington, DC: National Governors' Associaton, 1981).

[115] GAO, *Federal-State Environmental Program*, p. 45.

[116] *Ibid.*, pp. 47–48.

[117] Lawrence Mosher, "Regulatory Striptease—Watt Takes Aim at Surface Mining Regulations," *National Journal*, May 30, 1981, p. 973.

[118] National Governors' Association, *Eliminating Roadblocks*, p. 52.

[119] National League of Cities, *Recommendations of the National League of Cities on Regulatory Reform Prepared for the Presidential Task Force on Regulatory Relief*, May 1, 1981, p. 13.

[120] National Association of Counties, *American County Platform and Resolutions: 1980–1981* (Washington, DC: National Association of Counties, 1980), p. 165.

[121] NLC, *Recommendations on Regulatory Reform*, p. 13.

[122] "Permanent Regulatory Programs for Non-Federal and Non-Indian Lands," *Federal Register*, Vol. 46, No. 126, Wednesday, July 1, 1981: 34348–51.

[123] GAO, *Federal-State Environmental Programs*, p. 49.

[124] National Governors' Association, *Policy Positions: 1981–82* (Washington, DC: National Governors' Association, 1981), p. 22.

[125] GAO, *Federal-State Environmental Programs*, p. 83.

[126] *Ibid.*

[127] NGA, *Policy Positions*, p. 71.

[128] *Ibid.*

[129] GAO, *Federal-State Environmental Programs*, p. 83.

[130] NGA, *Policy Positions*. p. 71.

[131] GAO, *Federal-State Environmental Programs*, p. ii.

[132] Richard S. Hodes, President, National Conference of State Legislatures, letter to the Vice President, May 22, 1981, p. 3.

[133] Lawrence E. Mosher, "Reagan's Environmental Federalism: Are the States Up to the Challenge," *National Journal*, January 30, 1982, pp. 187–88.

[134] U.S. General Accounting Office, *Issues Surrounding the Surface Mining Control and Reclamation Act* (Washington, DC: U.S. Government Printing Office, 1979).

[135] NGA, *Eliminating Roadblocks*, p. 14.

[136] *Ibid.*

[137] *Ibid.*, p. 14.

[138] *Ibid.*, p. 41; NGA, *Policy Positions*, pp. 93, 109, 114.

[139] U.S. General Accounting Office, *Hazardous Waste Management Program Will Not Be Effective: Greater Efforts Are Needed* (Washington, DC: U.S. Government Printing Office, 1979), p. i.

[140] GAO, *Federal-State Environmental Programs*, pp. 58–59.

[141] Mosher, "Reagan's Environmental Federalism," p. 187.

[142] GAO, *Federal-State Environmental Programs*, pp. 70–76.

[143] *Ibid.*, p. 73.

[144] *Ibid.*, pp. 76–77.

[145] Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A-52 (Washington, DC: U.S. Government Printing Office,

1978), p. 308.

[146] Mel Dubnick and Alan Gitelson, "Nationalizing State Policies," in Hanus, ed., p. 56.

[147] *Ibid.*

[148] Frank J. Thompson, *Health Policy and the Bureaucracy: Politics and Implementation* (Cambridge, MA: The MIT Press, 1981), pp. 240–41.

[149] Pete Earley, "Watchdog," *Washington Post*, January 27, 1982, p. A–19.

[150] Mosher, "Reagan's Environmental Federalism," p. 187.

[151] Dubnick and Gitelson, p. 66.

[152] Richard B. Stewart, 'Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," *Yale Law Journal* 86 (1977), pp. 1222–23.

[153] *Ibid.*, pp. 1243–44.

[154] U.S. Congress, Senate, Committee on Environment and Public Works, *The Clean Air Act in the Courts*, A Report prepared by the American Law Division, Congressional Research Service, Library of Congress, Serial No. 97–2, 97th Congress, 1st sess., April 1981 (Washington, DC: U.S. Government Printing Office, 1981), p.73.

[155] 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded sub nom. EPA v. Brown*, 431 U.S. 99 (1977).

[156] *Id.* at 922.

[157] James A. Henderson, Jr., and Richard N. Pearson, "Implementing Federal Environmental Policies: The Limits of Aspirational Commands," *Columbia Law Review* 78 (1978), pp. 1463–64.

[158] Advisory Commission on Intergovernmental Relations, *An Agenda for American Federalism: Restoring Confidence and Competence*, A–86, p. 111.

[159] 29 C.F.R. Section 775.3

[160] *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).

[161] 426U.S. 833 (1976).

[162] National Association of Counties, *American County Platform and Resolutions: 1980–81* (Washington: National Association of Counties, 1980), p. 174.

[163] National League of Cities, "Recommendations of the National League of Cities on Federal Regulations," prepared for the Presidential Task Force on Regulatory Relief, March 1, 1981.

[164] In 1964, only 60 transit systems were publicly owned. By 1978 there were 463 public systems; Transportation Research Board, *Transit Boards: Composition, Roles, and Procedures* (Washington, DC: Transportation Research Board, May 1981), p. 2.

[165] NLC, "Recommendations." See also, Transportation Research Board, *Transit Boards*, p. 2.

[166] *San Antonio Metropolitan Transit Authority v. Donovan*, Civil Action No. SA 79 CA 457 (W.D. Tx, 1981).

[167] *Molina-Estrada v. Puerto Rico Highway Authority*, 51 LW 2005 (CA 1, 1982).

[168] 50 LW 4315 (1982).

[169] Cited in *The Washington Post*, 16 February 1983, p. A7.

[170] NLC, "Recommendations."

[171] Total publicly owned (all public ownership including municipal, federal, and cooperative) as of 1979: 1,486 plants or 42% of the total. U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States, 1980*, 101st ed., (Washington, DC: U.S. Government Printing Office, 1980), p. 613.

[172] *Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Justice Black concurring).

[173] Laurence H. Tribe, *American Consitutional Law* (Mineola, NY: The Foundation Press, Inc., 1978), p. 315. As of the 1980–81 period, 17 (a significant 34%) of the states operated liquor stores. The Council of State Governments, *The Book of the States, 1980–81*, Vol. 23 (Lexington, KY: Council of State Governments, 1980), pp. 282–83.

[174] Advisory Commission on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A–52 (Washington, DC: U.S. Government Printing office, 1978), pp. 233–72.

[175] Advisory Commission on Intergovernmental Relations, *An Agenda For American Federalism: Restoring Confidence and Competence*, A–86, p. 130.

[176] "Streamlining Federal Assistance Administration," *The Final Report to the President by the Federal Assistance Monitoring Project of the Advisory Commission on Intergovernmental Relations*, November 21, 1978, pp. 7–8.

[177] National Governors' Association, *Eliminating Roadblocks to Efficient State Government: The Governors' Green Book* (Washington, DC: National Governors' Association, 1981), p. 2.

[178] *Ibid.*, p. 9.

[179] Letter from Richard S. Hodes, President, NCSL, to the Vice President, May 22, 1981, p. 2.

[180] National Association of Counties, *Survey of the Effect of Cross-Cutting or National Policy Requirements on County Governments*, Washington, DC, February 19, 1981, p. 6.

[181] *Ibid.*, p. 13.

[182] *Recommendations of the National League of Cities on Regulatory Reform Prepared for the Presidential Task Force on Regulatory Relief*, Washington, DC, May 1, 1981, p. 24.

[183] *Ibid.*, p. 26.

[184] *Ibid.*, p. 27.

[185] Office of Management and Budget, *Managing Federal Assistance in the 1980's* (Washington, DC: U.S. Government Printing Office, 1980).

[186] Office of Management and Budget, *Managing Federal Assistance in the 1980's*, Volume 1, *Working Papers*, June 1980, pp. A–3–16—A–3–29.

[187] *Federal Register* 45, (November 7, 1980), 74416–20.

[188] Joseph Wright, deputy director, Office of Management and Budget, remarks before the Senate Subcommittee on Intergovernmental Relations, April 22, 1982, p. 1.

[189] *ibid.*, p. 2.

[190] *Ibid.*

[191] U.S. Congress, Senate, *Federal Assistance Improvement Act of 1981, Report of the Committee on Governmental Affairs to Accompany S 807*, 97th Cong., 1st sess. (1981), pp. 21–23.

[192] *Ibid.*, p. 25.

[193] For a discussion of the legal challenges states may face in administering the 1981 block grants, see Thomas J. Madden and Patrick R. Harkins, "New Block Grant Program Faces Period of Adjustment in the Courts," *The National Law Journal*, March 8, 1982, pp. 29–31.

[194] Charles A. Bowsher, Comptroller General of the United States, statement before the Subcommittee on Intergovernmental Relations, Committee on Governmental Affairs, U.S. Senate, on *Block Grant Implementation*, 97th Cong., 2nd sess. (1982), pp. 113, 114.

[195] Advisory Commission on Intergovernmental Relations, *A–85 Annual Report*, Washington, DC: 1977, (processed), p. 1.

[196] Advisory Commision on Intergovernmental Relations, *Improving Federal Grants Management*, A–53 (Washington, DC: U.S. Government Printing Office, 1977), p. 277.

[197] Memorandum from the President, to Heads of Executive Branch Departments and Agencies, the White House, Washington, D.C., March 23, 1978.

[198] National Association of Counties, *American County Platform and Resolutions: 1981–1982* (Washington, DC: National Association of Counties, 1981), p. 228.

[199] The National Governors' Association, *Eliminating Roadblocks to Efficient State Government* (Washington, DC: National Governors' Association, 1931), p. 4.

[200] Statement on the "Regulatory Reform Act of 1981," by James Frech, Associate Director, Illinois General Assembly, Washington Office, Illinois Commission on Intergovernmental Cooperation, June 23, 1981, p. 3.

[201] U.S. Congress, Senate, Committee on Governmental Affairs, *Regulatory Reform Act, Report of the Committee on Governmental Affairs, to Accompany S 1080,* (S. Rept. 97–284, 97th Cong., 1st sess. (1981), p. 97.

[202] 5 U.S.C. sec. 3 (1976).

[203] *Center for Auto Safety v. Tiemann*, Civil No. 74–1662 (D.C. Cir. 1976).

[204] Senate Committee on Governmental Affairs, *Regulatory Reform Act,* p. 96.

[205] Letter from Alan Beals, Executive Director, National League of Cities, to Honorable William Roth, Chairman of the Committee on Governmental Affairs, U.S. Senate, July 6, 1981.

[206] Christopher DeMuth, Statement before the Subcommittee on Regulatory Reform, the President's Advisory Committee on Federalism, December 15, 1981.

[207] Memorandum from Vincent Puritano to the ACIR, July 1977, p. 11.

[208] Section 401(b) of the *Intergovernmental Cooperation Act of 1966* (PL 90–577) says, in part, "All viewpoints—national, regional, state and local—shall, to the extent possible, be fully considered and taken into account in planning federal or federally assisted development programs" . . . and Sec. 401(d) of the act which says, "Each federal department and agency administering a development assistance program, shall, to the extent practicable consult with and seek advice from all other significantly affected federal departments and agencies in an effort to assure fully coordinated programs." This provision also was used to support the Presidental memorandum to Heads of Executive Branch departments and agencies of February 25, 1977, requiring consultation with state and local officials on matters having significant intergovernmental effects.

[209] The term "benefit" as used in this recommendation refers to payments made to an individual. The Administrative Conference of the United States has found that the exemption from APA participation requirements has included not only rulemakings concerning benfits and benefit programs, but rulemaking *in all matters related thereto*. Thus, such an exclusion has been deemed to cover many programs administered by the states including AFDC, Medicaid and unemployment insurance as well as such nationally administered ones as old age, survivors and disability insurance.

[210] Arthur E. Bonfield, "Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts" (Washington, DC: Administrative Conference of the United States, 1969), p. 4.

[211] The best account of agency argumentation on this point is contained in *ibid.*, chapter 5.

[212] *Ibid.*, p. 65.

[213] The Task Force on Legal Services and Procedure of the Hoover Commission (1955) cited in *ibid.*, p. 58.

[214] Administrative Conference of the United States recommendation, as adopted by the ACUS Committee on Rulemaking, Septemer 1969. More recently the conference has continued to advocate this position in its recommendations on S 1080 to the Senate Judiciary and Governmental Affairs Committees.

[215] Bonfield, "Public Participation," p. 62.

[216] The Advisory Commission on Intergovernmental Relations, *Agenda for American Federalism: Restoring Confidence and Competence,* A–86, p. 130.

[217] Alan Beals, Letter to Senator William Roth, Chairman of the Committee on Governmental Affairs, July 6, 1981.

[218] Advisory Commission on Intorgovernmental Relations, *Categorical Grants: Their Role and Design,* A–52, p. 316.

[219] Advisory Commission on Intergovernemntal Relations, *Citizen Participation in the American Federal System*, A–73 (Washington, DC: U.S. Government Printing Office, 1979), p. 14.

[220] Commission on Federal Paperwork, *Federal/State/Local Cooperation* (Washington, DC: U.S. Government Printing Office, 1977), p. 64.

[221] National Governors' Association, *Eliminating Road Blocks to Efficient State Government: The Governors' Greenbook* (Washington, DC: National Governors' Association, 1981), p. 10.

[222] National League of Cities, *Recommendations of the National League of Cities on Regulatory Reform*, May 1, 1981, pp. 17, 26.

[223] David M. Shell, "Skagway v. EPA: Cassandra's Prophecy Revisited," *Regulation*, November/December 1980, p. 51.

[224] U.S. General Accounting Office, *EPA Should Help Small Communities Cope With Federal Pollution Control Requirements*, Report CED–80–92 (Washington, DC: U.S. Government Printing Office, 1980), cover page.

[225] U.S. General Accounting Office, *A Market Approach to Air Pollution Control Could Reduce Compliance Costs Without Jeopardizing Clean Air Goals*, Report PAD–82–15 (Washington, DC: U.S. Government Printing Office, 1982).

[226] *Ibid.*, p. 102.

[227] U.S. Regulatory Council, *Regulating With Common Sense: A Progress Report on Innovative Regulatory Techniques*, Washington, DC: U.S. Regulatory Council, 1980).

[228] The items above are drawn from Office of the Vice President, Press Secretary, "Year-End Summary of the Administration's Regulatory Relief Program: Fact Sheet," Media Advisory for release December 30, 1981.

[229] Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief for State and Local Government: A Progress Report* (Processed) Washington, DC: August 1982, p. 9.

[230] These agendas may be published simultaneously with regulatory agendas of all upcoming regulations required by Executive Orders 12044 and 12291. "Regulatory agendas" should not be confused with the "regulatory calendars" which contain detailed information on major rules and are put together by the Regulatory Information Service Center.

[231] Testimony of Frank Swain, Counsel General for Advocacy, before the House Committee on Small Business, *Oversight Hearings on the Regulatory Flexibility Act*, 97th Cong., 2nd Sess. (1982).

[232] U.S. Congress, Senate, Committee on Governmental Affairs, *Regulatory Reform Act: Report to Accompany S 1080*, Report No. 97–305, 95th Congress, 1st Session, (1981), p. 77.

[233] Section 3 of S 1080.

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What is ACIR

The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

The Commission is composed of 26 members—nine representing the Federal government, 14 representing state and local government, and three representing the public. The President appoints 20—three private citizens and three Federal executive officials directly and four governors, three state legislators, four mayors, and three elected county officials from states nominated by the National Governors' Conference, the Council of State Governments, the National League of Cities/U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Congressmen by the Speaker of the House.

Each Commission member serves a two year term and may be reappointed.

As a continuing body, the Commission approaches its work by addressing itself to specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with the all important functional and structural relationships among the various governments, the Commission has also extensively studied critical stresses currently being placed on traditional governmental taxing practices. One of the long range efforts of the Commission has been to seek ways to improve Federal, state, and local governmental taxing practices and policies to achieve equitable allocation of resources, increased efficiency in collection and administration, and reduced compliance burdens upon the taxpayers.

Studies undertaken by the Commission have dealt with subjects as diverse as transportation and as specific as state taxation of out-of-state depositories; as wide ranging as substate regionalism to the more specialized issue of local revenue diversification. In selecting items for the work program, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

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